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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-869

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit ordering enforcement of Respondent's order (1) finding employer discrimination in a layoff and recall instituted strictly in order of seniority for solely economic purposes and (2) finding Petitioner committed an unfair labor practice by sending a non-coercive letter to its employees informing them of their statutory right to revoke union authorization cards when Petitioner had reason to believe that the employees would be subjected to coercion by union organizers seeking authorization cards.

Opinion Below.

The Decision of the Court of Appeals is reported at 445 F.2d 901 (9th Cir. 1971), and a copy is attached hereto as Appendix A. A Petition for Rehearing was denied in an unreported Opinion and a copy is attached hereto as Appendix B. The Order of the National Labor Relations Board, which is ordered enforced in the Opinion, appears in 180 NLRB No. 1 (1971), and a copy is attached hereto as Appendix C. A copy of the decision of the Trial Examiner, which was affirmed by the Board, is attached hereto as Appendix D.

Jurisdiction.

The Decision of the Court of Appeals was entered on June 23, 1971. A Petition for Rehearing was denied on October 8, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review.

1. Did the Court below err in holding that a layoff and recall carried out in order of seniority and for solely economic purposes was unlawful under Section 8(a)(3) of the Labor Management Relations Act (hereinafter referred to as the "Act")?

2. Did the Court below err in finding a layoff unlawful where there was direct evidence of the economic motivation for the layoff and the finding of discrimination was based solely on inferences drawn from totally unrelated activities of the Petitioner?

3. Did the Court below err in holding that the Petitioner could not engage in any expression that might persuade employees to repudiate the union despite the conceded absence of threat of reprisal or force or promise of benefit?

Constitutional Provision Involved.

"Congress shall make no law . . . abridging the freedom of speech. . . ."

First Amendment to the United States Constitution.

Statutes Involved.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158-(a)(3) of this title."

Section 7 of the Labor Management Relations Act, 29 U.S.C. §157.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

Section 8(a)(1) of the Labor Management Relations Act, 29 U.S.C. §158(a)(1).

"(a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization. . . ."

Section 8(a)(3) of the Labor Management Relations Act, 29 U.S.C. §158(a)(3).

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 10(e) of the Labor Management Relations Act, 29 U.S.C. 160(e).

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(c) of the Labor Management Relations Act, 29 U.S.C. §158(c).

Statement of the Case.

1. *Background of the Proceedings.*

Petitioner, The Deutsch Company, Electronic Components Division (the "Deutsch Company") is an employer charged with committing unfair labor practices during a union organization drive. The grounds for one charge was a layoff admittedly instituted in order of seniority in which union and non-union members were treated alike and which was justified by economic necessity as shown by uncontradicted testimony. This was held to be a violation of Section 8(a)(3) of the Act.

The basis for the second charge was a letter notifying employees of their statutory right to revoke union authorization cards if the cards had been signed because of false or threatening statements and actions of union organizers. This was held to be a violation of Section 8(a)(1) of the Act in spite of the fact that the letter admittedly was unaccompanied by direct or implied threat of reprisal or promise of benefit.

2. *The Need for a Layoff Becomes Apparent.*

The Deutsch Company's plant in Oceanside, California was opened in August, 1965. It was part of an integrated operation involving a Deutsch Company plant in nearby Banning, California—together the two plants produced electronic connectors for the aerospace industry. By late 1967, the work force at Oceanside had multiplied from a handful to five hundred and seventy employees. Beginning in the fall of 1967, the President and Chairman of the Board of the Deutsch Company admonished the plant manager that the Oceanside plant was exceeding its budget and instructed him to reduce the number of employees. They continued to press for a large reduction in the work force because plant efficiency was increasing and demand for the plant's products had fallen.

3. *The Union Begins Its Organization Drive.*

Thereafter in March of 1968, the International Association of Machinists and Aerospace Workers (the "Union") decided to start an organization drive at the Oceanside plant, and first notified the Deutsch Company of its intent to conduct an organization drive by letter.

4. *The Deutsch Company Carries Out Its Layoff Plan in Order of Seniority.*

On the morning of March 11, the President of the Deutsch Company and the Chairman of the Board, notified the Oceanside Plant Manager that in view of the continued overbudget condition and decreasing product demand the layoff could no longer be postponed. While the layoff was being implemented by examining department schedules the Union's letter was received. After examination of the work complement, inventory, and orders attributable to each department, it was determined that ninety-six employees be laid off in strict accordance with seniority.

The fact of the layoff was kept from employees until on March 15 the Deutsch Company could put the layoff into effect. In order to minimize the inevitable anti-employer animus accompanying such a layoff, the Deutsch Company stressed that the layoff was due to economic circumstances, was only temporary and that employees would be recalled as soon as possible, again according to seniority. The layoff was carried out in accordance with the long-standing Deutsch Company policy of seniority which had been explained to each employee in a "Welcome" manual given to him when he was first hired. Union adherents were subject to the same principle of seniority as all other employees.

At no time did the Deutsch Company or any employee suggest any connection between the layoff and the advent of the organizational effort.

5. *The Deutsch Company Informs Its Employees of Their Rights Under the Act.*

The initial days of the Union organizational drive saw vigorous Union activities in an attempt to secure authorization cards. The Deutsch Company sent two

letters to its employees. The second was found to constitute a violation of Section 8(a)(1) of the Act not because of any threat or promise but solely on the grounds that the Deutsch Company thereby attempted "to induce employees to sign statements repudiating the Union."

The letter itself contained no threat or promise. It merely informed the employees of their statutory rights. The pertinent part of the letter read as follows:

> "If you have changed your mind, been misinformed, coerced, threatened, or intimidated into signing an authorization card . . . you can revoke that card by mailing the enclosed postcard. The card will be kept in confidence by the National Labor Relations Board."

Attached to the letter was a stamped postcard addressed to the NLRB office in Los Angeles, California. If signed and mailed, the card would revoke any prior union authorization card. No follow-up inquiries were made of the employees to see if the revocation cards had been used, and the Deutsch Company did not attempt to learn this from the NLRB.

6. *The Union Loses the Election.*

On April 5, 1968, the Union filed a representation petition with the NLRB, and an election was held at the Deutsch Company on June 28, 1968. Out of four hundred sixty-two eligible voters, one hundred sixty-three workers voted in favor of the Union and two hundred seventy-five voted against it. No objections to the election were ever filed and the Board certified the results of the election.

7. *Jurisdiction Below.*

Some of these charges were decided in favor of the Union by the NLRB and petition for enforcement was brought before the Ninth Circuit Court of Appeals pursuant to Section 10(e) of the Act.

REASONS FOR GRANTING THE WRIT.

I.

The Erroneous Decision Below Will Adversely Affect a Large Segment of the Economy by Holding Unlawful and Therefore Prohibiting Legitimate Management Decisions Made During Increasingly Extended Periods of Employer-Union Activity, Despite the Lawful Economic Motivation for the Decision and Its Possible Adverse Effect on the Employer in Any Contest With a Union.

Clear and realistic rules are needed to establish guidelines for legitimate employer action and to protect the rights of employees. An employer must know when he can make changes in conditions of employment without committing a violation of Section 8(a)(3). Never has there been a more pressing need for clarification of the scope of employer economic decision making during periods of employer-union activity. Employer-union confrontation—ranging from organizing activity, to bargaining through strike activity—has become increasingly impassioned and, particularly relevant, increasingly extended in time span.

Thus, the Board's caseload hit a new quarterly high during 1971 as 9,793 cases were filed with the Board. Over 3,436 petitions for elections were received in the current quarter. Unfair labor practice charges filed were up 29% over the corresponding prior quarter. As of June 1, 1971 over 11,232 cases of all types were pending disposition at various procedural levels. Sim-

ilarly, strike-caused idleness was up over one-third from the preceding period and has been surpassed only three times in the past quarter century. Over 3.3 million workers were involved in work stoppages in 1970. Man days lost because of strikes rose to 62 million to reach an all-time high for this decade. And most of these disputes were centered in the vital transportation, construction, communications and electrical equipment industries. (See 76 Labor Relations Reporter 40; 78 Labor Relations Reporter 53).

At the same time, the need for increased economic decision making by employers, especially with regard to the terms and conditions of employment of the work force, has resulted from—basic forces provoking increasingly strident demands by unions. Inflation and the imposition of stringent economic controls never before imposed during peacetime in this Country[1], have made management and workers increasingly conscious of and sensitive to changes in terms and conditions of employment.

When the foregoing factors are added to the customary need of an employer to constantly evaluate his costs, production, inventory, work force and sales levels, it is imperative that clear and reasonable rules be enforced regulating the area of decisions management can make during the course of employer-union activity.

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[1]Acting under authority of the Economic Stabilization Act of 1970 (84 Stat. 799, 12 U.S.C. §1904 *et seq.*), the President issued executive orders regulating wages, salaries, prices and rents. (Executive Order No. 11,615, 36 Fed. Reg. 15727; Exec. Order No. 11,627; 36 Fed. Reg. 20139. The retiring Chairman of the President's Economic Council has predicted that there would be continued federal control over wages and prices for a long time to come (Los Angeles Times, December 31, 1971, part one, page 1, column 5).

For example, in the present case, almost 16 weeks elapsed between the advent of the Union's organizational activity and the holding of the election. And the unfair labor practice charges arising from the organizational activity have been pending for nearly 4 years.

Congress and this Court have long recognized that the course of business must be allowed to continue during the commencement and process of employer-union activity. The Act expressly provides that any management decision may be made and implemented—even during union activity—so long as there is no intent "to encourage or discourage membership in any labor organization" (Section 8(a)(3) of the Act). Similarly, the Act provides that the Board's mere claim that a particular management decision was made with the prohibited intent cannot stand unless "supported by substantial evidence on the record considered as a whole." (Section 10(e) of the Act).

These two standards—that any management decision is lawful if not made for the prohibited reason, and that no claim of a prohibited intent can be sustained without clear and convincing evidence in the record as a whole—have been effectively repealed by the decision of the Court below.

The Board did *not* find that the layoff treated union organizers differently than other employees. It did *not* find that the layoff focused on employees who were identified with the Union or were especially susceptible to its claims. It did *not* find that the layoff

deprived the union organization drive of an adequate number of organizers or of especially competent organizers. Indeed, it is uncontradicted that the layoff was carried out strictly in order of seniority and that no implication of anti-union motivation was expressed by the Deutsch Company.

The ruling below ignores the issues of motivation and substantial evidence to support a finding of unlawful motivation. It prevents rational prediction of economic practices which will not be violative of Section 8(a)(3). Discrimination may be found whenever any union activity is underway. And union activities of some sort are virtually always taking place. Nearly 85 million people are in the American work force. Over 20 million are now members of national or international unions. In an average yearly quarter the NLRB receives over 4,000 unfair labor practice charges. Organizational activity, preparation for collective bargaining, processing grievances, and strike activity go on throughout the year. The ruling below in effect holds that any employer economic decision made while any of these activities is taking place is unlawful.

It is imperative that the Court assume jurisdiction of this case to maintain the integrity of this Court's rulings that the Board is not free to ignore those clear and rational standards for employer conduct which have been specified in the Act. Only such decisive action can reverse the inevitable consequences of the principles introduced by the decision below.

II.

The Decision Below Is Contrary to This Court's Interpretation of the Act and in Effect Reverses Those Guidelines Which Have Repeatedly Been Held Necessary to Allow Predictability and Permit Management to Continue Operations During Periods of Employer-Union Activity.

A. This Court Has Held the Act Requires Illegal Motivation Be the Only Test for the Lawfulness of Employer Economic Decisions.

The decision below held that because of the size of the layoff and because it occurred at about the time the union organization drive began, that therefore the Deutsch Company had violated Section 8(a)(3) of the Act. The ruling conflicts with all logic and with the decisions of this Court and of other circuit courts which have considered this question.

Prior to the decision below, the courts have uniformly held that absent an unlawful intent there can be no violation of Section 8(a)(3) of the Act, even if employer discrimination could conceivably discourage union membership.

NLRB v. Brown, 380 U.S. 278, 286 (1965) (upholding decision of no prohibited discrimination in use of temporary replacements):

> "The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union. . . ."

Montgomery Ward & Co. v. NLRB, 107 F.2d 555, 564 (7th Cir. 1939) (reversing in part an NLRB finding of discrimination in discharge):

> "We believe that the term 'discrimination' takes its meaning from the context of Section 8(3), and that it refers to anti-union discrimination, that is,

to a different treatment accorded union employees solely because of their union memberships or activities and without reference to whether they hold comparable or non-comparable jobs."

NLRB v. A & P Tea Co., 340 F.2d 690, 693, (2d Cir. 1965) (reversing NLRB finding of prohibited discrimination for lockout of members of union not seeking recognition):

> "We have come to this determination because we find nothing in the record to establish the two elements vital to a finding that the respondents unlawfully discriminated against the service employees. There is not a scintilla of evidence establishing either (a) that the food chain *intended* to discriminate on the basis of union membership or activities or (b) that an *effect* of the layoffs was to discourage such membership or activities."

The decision below has applied the rule as if it were opposite from what this Court has stated it to be. The decision below has turned the rule on its head: regardless of the fact that the layoff occurred at about the time union organization activity began, there was no intent to influence union membership.

B. The Court Below Failed to Place the Burden of Proof on the NLRB.

The NLRB bears the burden of proof to show that an employer's economic decision was designed to influence union membership.

NLRB v. River Togs, Inc., 382 F.2d 198, 203 (2d Cir. 1967) which reversed a Board finding that a discharge was unlawfully discriminatory because the

Board had placed the burden of proving justification on the employer.

See also *Steel Industries, Inc. v. NLRB*, 325 F.2d 173, 177 (7th Cir. 1963) (reversing an NLRB finding of unlawful discrimination in discharge because the employer's reason was not compelling to NLRB):

> ". . . as we have so often said: management is for management. Neither Board nor Court can second guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids." (citing prior Seventh Circuit decisions).

C. The Court Below Incorrectly Accepted Inferences Which Do Not Establish Any Unlawful Motivation and Which Must Be Rejected in Light of Direct, Uncontroverted Evidence of the Lawful Economic Reasons for the Layoff.

Not only does the decision below incorrectly require the Deutsch Company to establish the lawfulness of the layoff, it improperly rejects the overwhelming evidence of the lawful economic motivation for the layoff in favor of Board drawn inferences which do not establish improper motivation for the layoff.

As part of the panoply of statutory guidelines designed to permit normal business operations during employer-union activities, the Act provides that the Board cannot ignore direct evidence of economic

reasons for employer conduct in preference for indirect inferences such as those from which the Board here sought to find unlawful motivation.

This Court has ruled that:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress thas merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

This Court's decision has been followed by the circuits.

Thus in *NLRB v. Audio Industries, Inc.*, 313 F.2d 858, 860-61 (7th Cir. 1963) the Court reversed an NLRB order because the Board had failed to consider uncontradicted testimony of the employer. The Court gave the following rationale:

> "The Trial Examiner's inferences of antiunion animus on the part of respondent based on these incidents cannot be sustained. Although it is a general rule that questions of credibility are for the Trial Examiner and the Board . . . inferences contrary to direct testimony are not sufficient to support a finding of antiunion animus."

Similarly, the court in *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452, 458 (6th Cir. 1967), in re-

versing an NLRB finding of discriminatory discharge based solely on inference, stated:

> "The Board rejected the business motives for the layoff and the discharges. Its decision is based entirely on inferences. The entire record must be reviewed, and overbearing evidence calling for contrary inferences must be considered. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474."

See also *Serv-Air v. NLRB*, 395 F.2d 557, 565 (10th Cir. 1968), *cert. den.* 393 U.S. 840 (1968) (*reversing* NLRB ruling that layoff was discriminatory where uniform objective criteria were used to determine which employees to discharge).

The NLRB must base a finding of unlawful motivation on substantial evidence. Nevertheless, in this case, the direct evidence of legitimate economic motivation was rejected in favor of inferences which could not reasonably be drawn from the facts relied upon.

The Oceanside plant expanded rapidly and went over budget. Pressure to return to the budgeted level of expense was finally capable of being satisfied when increasing output combined with decreasing demand and excess productive capacity at other Deutsch plants permitted a reduction in the work force.

After the reduction in employment, the Deutsch Company met its production requirements without difficulty and was able to send out some work to take up the slack in other Deutsch plants.

Ignoring the foregoing uncontradicted direct evidence, the Board found the layoff to have been unlawfully motivated because the union organization drive began about

the time the ability to implement the layoff occurred, other claimed unfair labor practices were held to conclusively contaminate all of the Deutsch Company's conduct, and little advance notice of the layoff was given to employees.

The inferences drawn to support the decision below obviously fail to sustain a finding of unlawful motivation when considered in opposition to the inherently persuasive direct evidence of the lawful economic motivation for the layoff.

The insubstantial basis for the inferences drawn by the Board is established by testing them against the direct evidence and inferences flowing therefrom. The layoff was carried out in accordance with the strict application of senority. No union enthusiast was singled out for layoff. Employees were laid off rather than discharged and were therefore eligible to vote in the union election and provided a potentially sizable block of disgruntled employees who would tend to favor the union. The layoff was carried out quickly and quietly to have the least possible disruptive effect on the plant and the remaining work force.

The inferences from the evidence relevant to the layoff could not possibly establish a substantial connection between it and the Union's organizational drive. And no representative of the Deutsch Company, no employee of the Company and no representative of the Union ever claimed a connection until the Board first claimed such a relationship in an amended complaint months after the layoff.

The decision below is based on illogical inferences with no supporting evidence. Those inferences are completely lacking in substance when contrasted with the

substantial and uncontradicted evidence of overwhelming economic justification for the layoff. This Court should grant certiorari to prevent further erosion in certainty as to permitted employer economic decision making during employer-union activity.

III.

The Holding of the Court Below Ignores the Spirit of Free Debate Encouraged by the Act and Repudiates the Statutory Directive That Expressions Are Protected in the Absence of Coercion.

A. The Act Encourages Free and Open Debate Which May Be Curtailed Only to Exclude Threat of Reprisal or Promise of Benefit by an Employer.

The Act seeks to extend to employees the right to freely determine whether or not to join a labor union. A truly free determination demands that the employees have access to all pertinent facts and points of view. By statutory directive, Congress has chosen the adversary system as the vehicle by which the employee may be assured of learning the information necessary to make a thoughtful choice. Section 8(c)[2] of the Act provides as follows:

> "The expressing of any views, argument or opinion, where the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit."

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[2]The legislative policy is clear.

H.R. Rep. No. 243, 80th Cong., 1st Sess., p. 33: "[N]othing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal."

H.R. Conf. Rep. No. 502, 80th Cong., 1st Sess., p. 45: "The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination."

The only limitation upon the reciprocal rights of the employer to express his views and opinions and the employees' rights to receive and utilize such information is that the communication contain no threat of force or reprisal, or promise of benefit. *NLRB v. United Steelworkers of America*, 357 U.S. (1958); *NLRB v. Laars Engineers, Inc.*, 332 F.2d 664, 667 (9th Cir. 1964).

The Board's brief before the Court below illustrated that there must be coercion before an employer will be found to have forsaken the Act's free speech guarantee. In the Board's brief there was no contention that the letters alone or in conjunction with the surrounding circumstances contained any threat of reprisal or force or promise of benefit. The counsel for the General Counsel conceded that neither the letters nor the surrounding circumstances contained any threat or promise and stated that it was the Board's position that these letters constituted a *per se* violation of the Act regardless of the absence of any threat or promise.

In adopting the *per se* position urged by the Board, the Court below violated its own prescription for encouraging vigorous debate. As stated in *NLRB v. TRW-Semiconductors, Inc.*, 385 F.2d 753 (9th Cir. 1967):

> "While the trial examiner in the present case did generally cast his findings in terms of Section 8(c), we think that his findings were likewise based upon its conclusion that the statements could be considered coercive within the meaning of Section 8(a)(1). *The broad language of Section 8(a)(1) is not the test of whether election propaganda violates the Act. It must first be found that the challenged material contains a threat of force or reprisal or promise of benefit by the employer.*

> "The guaranty of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial . . .
>
> "Section 8(c) does not protect only those views, arguments or opinions that are correct, nor does it forbid them because they may be demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order." 385 F.2d at 759.

B. In the Absence of Coercion, Advising Employees of Their Rights Is a Protected Activity as Are Employer's Accusations Aimed at Union Activities.

Whether the letters are characterized as educational tools or accusatorial indictments implying union wrongdoing, the law is clear that they are protected because they lack any threat or promise.

The appellate courts have uniformly held that not only is an employer protected in advising his employees of their rights but that, in the absence of threat or promise, such activities should be encouraged. *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (6th Cir. 1967); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2nd Cir. 1952); *NLRB v. Armco Drainage & Metal Products*, 220 F.2d 573 (6th Cir. 1955); *NLRB v. Blossom Products Corp.*, 121 F.2d 260 (3rd Cir. 1941); *Midland Steel Products v. NLRB*, 113 F.2d 800 (1st Cir. 1940).

Similarly, derogatory remarks and accusations are not unlawful if unaccompanied by threat or promise. *Linn v. Plant Guards Local 11*, 373 U.S. 53 (1966); *NLRB v. Fitzgerald Mills*, 313 F.2d 260 (2d Cir., 1963); *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (6th Cir., 1967); *NLRB v. Brown-Brockmeyer Co.*, 143 F.2d 537 (6th Cir., 1944); *NLRB v. Citizen News Co.*, 134 F.2d 962 (9th Cir., 1943).

For example, in *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (6th Cir., 1967), the company, by letter, accused the union of misrepresenting to the employees that when an authorization card was signed no one other than a union representative or a representative of the National Labor Relations Board would ever see this card. The company pointed out to the employees that in many instances the signed cards would be disclosed to the company. The court, in finding that the letter was protected by Section 8(c) of the Act, expressed its rationale as follows:

> "There is no oral testimony of any threats or reprisals. The trial examiner did not state what reprisals, if any, were threatened. It is understandable because none is contained in the letter." 372 F.2d at 204.

In the foregoing the communication was protected because it contained no threat of reprisal or promise of benefit. Likewise in this case the letter from the Deutsch Company to its employees contained no threat and no reprisal would have been possible because the Deutsch Company could not find out which employees might have used the cards to repudiate the Union. Under these circumstances, the letter is protected, indeed encouraged by the policy of the Act because it informed the employees of relevant and useful information concerning their rights.

C. The Holding of the Court Below Is in Conflict With All Decisions of the Courts of Appeals Which Have Considered the Issue of Similar Communications Including the Prior Decisions of the Court Below.

All the Courts of Appeals which have considered the question of the right of an employer to advise his employees of the right to withdraw authorization cards and provide means to do so have held the employer's actions to be permissible in the absence of coercion.

In *Federation of Union Representatives v. NLRB*, 339 F.2d 126 (2d Cir. 1964), the court found that the employer's solicitation of resignations from the union by means of a face-to-face conversation without threat of reprisal or promise of benefit was permissible.

In *NLRB v. Brookside Industries, Inc.*, 308 F.2d 224 (4th Cir. 1962), the employer's personnel director advised some employees of how to revoke their authorization cards. The court ruled that because there had been no unlawful threats or promises such activity was protected.

On three prior occasions, the Court below has considered the issue before this Court. In each case it has denied enforcement of the Board's order.

In *NLRB v. Sun Co. San Bernardino*, 215 F.2d 379 (9th Cir. 1954), the employer advised his employees that they could cancel authorization cards by writing to the union. The court found that because the conduct contained no threat of reprisal or force or promise of benefit, there was no unfair labor practice, and the conduct was protected by Section 8(c) of the Act.

In *NLRB v. The Deutsch Company*, 408 F.2d 684 (9th Cir. 1969), the issue before the court was, as in this case, the lawfulness of informing employees by letter of their right to withdraw authorization cards.

The court held that the proscriptions of the Act were not intended to encompass trivial behavior when First Amendment rights were jeopardized.

In *S. H. Kress & Co. v. NLRB*, 317 F.2d 225 (9th Cir. 1963), employees reported to their employer that they did not believe that 30% of the employees had signed cards. Thereafter, the employer interviewed *individually* substantially all of the unit petitioned for by the union. The interviews were conducted in a closed storeroom area. Each employee was handed a mimeographed form which stated in the alternative that he had not signed for the union or that he had signed an authorization card and wanted it revoked and was asked to sign one or the other in front of management representatives. The order of the Board was set aside on the grounds that the employer's acts were non-coercive and should even be encouraged as an aid to employees in exercising their Section 7 rights.

D. The Board Conceded That the Letter Did Not Contain Any Threat of Reprisal or Force or Promise of Benefit and the Facts Demand Such a Concession.

The Board in the instant case conceded that there was no threat or promise; nonetheless, the Court below adopted the Board's position that the letter constituted a *per se* violation of the Act. An examination of the facts compels the conclusion that the rationale of the Court below, *i.e.*, a *per se* violation, was the only basis upon which the Court could find the letter unlawful.

Here the Deutsch Company sent its employees a letter which indicated that if they had been misinformed, coerced or intimidated into signing an authorization

card, they could revoke it by a particular method. The letter was not coercive and the Board makes no such contention.

The Deutsch Company was scrupulously careful in avoiding any threat or promise. In fact, rather than merely avoiding making any threat or promise, which is all that Section 8(c) of the Act requires in order to preserve free speech protection (see *Federation of Union Representatives v. NLRB, supra; NLRB v. Brookside Industries, Inc., supra; NLRB v. Sun Co. San Bernardino, supra*), the Deutsch Company made absolutely certain that no employee would feel intimidated or threatened in deciding whether to withdraw his card. The enclosed post card was addressed to the Board's Regional Office and simply stated the sender's desire to revoke his authorization card. The post card was not returnable to the Deutsch Company. The employees were not required to indicate to the Deutsch Company whether the post cards were sent, and the employees were not asked what they had chosen to do with the post cards. With this knowledge, the employees could exercise their rights freely and without fear because they knew that the Deutsch Company had no way of knowing what action, if any, the employee had taken with respect to the card; therefore, there was no possibility of coercion or interference with the right of the employees to exercise their freedom of choice.

There was no inducement, unlawful or otherwise. The Deutsch Company did not have a supervisor pass around the letters or cards; did not threaten to close the plant or discharge employees, or attempt to find out who withdrew from the Union. To the contrary, the Deutsch Company did everything possible to maintain and preserve a clinically free and noncoercive atmosphere.

The actions of the Deutsch Company are therefore protected because the Deutsch Company had a right to noncoercively advise its employees of the action they could take in deciding to be or not to be a member of a union, and in providing the employees with a means of exercising their rights. The letter and post card allowed the Deutsch Company to test its ideas in the political marketplace while guaranteeing to the employees an opportunity to freely and effectively exercise their right to conveniently choose what action to take in the reflective atmosphere of their own homes without fear of coercion.

E. The Court Below Is the First Court to Hold as a Matter of Law That a Communication Which May Result in Union Disaffiliation Is Unlawful.

1. *The Court Below Erred in Holding the Letters Unlawful Because They Might Lead to an Employee Decision to Refuse Union Affiliation; Only if the Letters Contained a Threat or Promise Could They Have Been Found Unlawful and No Threat or Promise Existed.*

The Court below held the sending of the letters to be a *per se* violation of the Act and sought to justify its holding by accepting the Trial Examiner's conclusion that "it is a recognized form of unlawful interference to induce employees to sign statements repudiating the Union."

It is respectfully submitted that this is no rationale at all. It is undisputed that it is not the undermining of employees' support of the Union that is contrary to the law but the manner, method and approach used in doing so which makes a particular act violative; *i.e.*, an expression containing a threat of reprisal or force

or promise of benefit. It is undisputed that eroding employee support for a union by such activities as accusing the union of trying to take away promised wage increases (*NLRB v. Gotham Industries*, 406 F.2d 1306 (1st Cir. 1969)); warning employees of union trickery and that unionization means strikes and loss of jobs (*NLRB v. Hawthorne Co.*, 404 F.2d 1205 (8th Cir. 1969)); informing employees that the union had deprived the store of heat and had secreted purported authorization cards from impartial persons as a check of majority status (*NLRB v. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir 1944)); telling employees that signatures on authorization cards would not be kept secret (*NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (6th Cir. 1967)), and all other communications attacking unionization are lawful if unaccompanied by threat or promise.

2. *The Letter Did Not Constitute a Per Se Violation of the Act and to Be Found Unlawful Would Have to Contain a Threat or Promise.*

The cases which have upheld Board findings of violation of Section 8(c) of the Act conclusively demonstrate that an activity which may have the ultimate result of union disaffiliation is not a *per se* violation of the Act but to be unlawful must be accompanied by threat or promise. Thus, in *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818 (D.C. Cir. 1970), the company through its president and by leaflet stated that if the employees chose to remain loyal to the

union and not to withdraw their authorization the company would discontinue its practice of soliciting marginal contracts and close the plant. Furthermore, the company required that each employee fill out and sign a questionnaire which dealt with union organizing activities (requiring disclosure of which employees spoke about joining the union, what promises were made, etc.).

And, in *NLRB v. Price-Less Discount Foods, Inc.*, 405 F.2d 67 (6th Cir. 1968), the court's rationale for its decision was as follows:

> "Although the letters contain language to the effect that the request for withdrawal of authorization was made of the employees' own free will and with no outside pressure, the evidence to the contrary is substantial. Solicitation, pressure and coercion are proved by convincing evidence." 405 F.2d at 71.

Similarly, in *Retail Clerks International Association v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967), the employer had determined to institute a new benefits program throughout its chain of stores. As part of its decertification plan, the company delivered speeches throughout the retail clerk's stores wherein the speaker read a three-page introduction prior to explaining the benefits the employer wished to give the employees. The message conveyed by the introductory portion of the speech was that because of the presense of the union in these stores, the benefits unfortunately would not be given at that time.

F. The Decision of the Court Below Proscribes an Established Practice and Leaves No Practical Alternative Which Insures That Employees Will Be Informed of Their Rights.

The effect of the decision of the Court below is to proscribe a traditional and widespread practice. Informing employees of their rights in regard to union affiliation has on a national scale long been used as an educational tool. The letter is generally chosen as the mode of communication rather than oral discussions because of the desire to insulate employees from any express or implied coercion.

If employers are absolutely curtailed from communicating with their employees, the only possible alternative will be either (1) the union informing the employees of their right to withdraw—an unlikely prospect—or (2) an employee going to the Board for an explanation of his rights—an option which assumes a great deal of employee sophistication, is much more inconvenient, runs against the employee's natural reluctance to become entwined with bureaucracy, and is generally a less satisfactory means of assuring that the views of employees will be reflected in political action. The upshot of the lower Court's ruling is to deny to employees knowledge of a precious right and to deprive them of the choice to join or not to join a union.

G. The Effect of the Decision of the Court Below Will Be to Chill All Anti-Union Communications and to Substantially Still the Voice of Employers in the Theater of Union Organization Campaigns.

Perhaps more important are the implications of the rationale of the Trial Examiner adopted by the Court below. The decision condemns the Deutsch Company's acts because they might "induce employees to sign statements repudiating the Union."

The legislative history of Section 8(c), the holdings of this Court, the Court below, and the other Circuit Courts all agree that the purpose of Section 8(c) is to protect and stimulate debate as to the merits of unionization. Section 8(c) imparts to labor-management relations the philosophical concept underlying the First Amendment that truth is the distillation of opposing views. In practice, substantially all of the communications between an employer and an employee in regard to unionization negatively portray the benefits of union affiliation.

As stated by this Court in *Linn v. Plant Guards Local 114*, 383 U.S. 53, 60 (1966):

> "We acknowledge that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues affecting labor and management. And, as we stated in another context, cases involving speech are to be considered against the background of a profound . . . commitment to the precepts that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack."

See also *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) (same result on First Amendment grounds).

The effect of the decision of the Court below is to limit the protection afforded by Section 8(c) to pro-union sentiment only and minimally to chill any communciation which could be interpreted as discouraging union support. The result will be to discourage communications which admittedly are intended to un-

dermine union support, previously held to be lawful absent coercion. These include predictions of loss of work, harder work, and plant closure with unionization (*NLRB v. Golub Corp.*, 388 F.2d 921 (2nd Cir. 1967)); conclusions that employees would lose rather than benefit from union representation (*NLRB v. Modern Plating Co.*, 358 F.2d 46 (7th Cir. 1966)); opinions that with unionization would come loss of customers and increasing costs (*P. R. Mallory & Co. v. NLRB*, 389 F.2d 704 (7th Cir. 1967)); indicating that the employer would deal hard with the union if the union was successful (*NLRB v. Wilson Lumber Co.*, 355 F.2d 426 (8th Cir. 1966)), and impressing upon employees that unionization would disrupt employer-employee relationships and subject employee job security to the whims of union leaders (*NLRB v. TRW-Semiconductors*, 385 F.2d 753 (9th Cir. 1967)).

H. The Court Below Insists That an Employer Justify Its Right to Speak Before the Employer Will Be Afforded the Dispensation of Free Speech and Makes the Burden of Showing Justification an Impossible Task.

The Trial Examiner and the Court below ostensibly seek to assuage the harshness of the rigid holding by indicating that while the absence of threat, promise or coercion will not protect anti-affiliation statements, an employer may be able to justify its comments as a response to union coercion.

To so condition an employer's right of free speech is to shift from the traditional yardstick, *i.e.*, all speech is protected unless accompanied by coercion, which is

the test under Section 8(c), to no speech is protected unless justified, the new test promulgated by the Court below. This approach fails to consider (1) that there is no unfair labor practice without threat, promise or coercion, and (2) that an employer may actively advise employees of their rights to disavow a union in the absence of justification if the communication is non-coercive.

I. Despite the Prior Decisions of This Court and the Enactment of Section 8(c) of the Act, the Court Below Sanctions the Board's Reversion to Its Pre-1941 Position Which Was Condemned by This Court and Thought to Have Been Put to Rest by the Passage of Section 8(c) of the Act.

Prior to 1941, the Board required an employer to remain strictly neutral in labor-management relations and prohibited the employer from expressing his views as to the relative advantages and disadvantages of union-affiliation.[3] By proscribing employer communications the Board denied to employees the right to receive and utilize information and opinions supplied by one of the parties most interested in an organizational drive. Commencing in 1941 with the case of *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), this Court admonished the NLRB that an employers' communication could not be the basis for an unfair labor practice if the communication was unaccompanied by threat or promise.

The legislative history of Section 8(c) conclusively evidences that Congress, in adopting the yardstick enunciated by this Court, agreed that the decisions of the Board were far too restrictive of the employer's

[3]See Koretz, Employer Interference with Union Organization Versus Employer Free Speech, 29 Geo.Wash.L.Rev. 402-403.

right of free speech in the expression of his views on labor matters. By adding Section 8(c), Congress unequivocally declared that an employer's expression could no longer constitute an unfair labor practice unless the expression contained a threat or a promise.

Since the adoption of Section 8(c), this Court has not sought to clearly define the parameters of Section 8(c) or to describe an employer's rights to communicate with his employees under Section 8(c).[4]

However, it is now apparent that there is a pressing need for this Court to consider the scope of Section 8(c). Since 1947, the significance of labor relations matters has grown tremendously. The scope of the Board's jurisdiction has grown until practically the country's entire work force has been made directly or

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[4]H.R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947): "Although the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal." See also S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947): "The Board has placed a limited construction upon these decisions [Thomas v. Collins, 323 U.S. 516 (1945) and NLRB v. American Tube Bending Co., 134 F.2d 993 (1943)] by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated [Monumental Life Insurance, 69 N.L.R.B. 247 (1946)], or if the speech was made in the plant on working time [Clark Brothers, 70 N.L.R.B. 802 (1946)]. The Committee believes these decisions to be too restrictive. . . ."

[5]This Court has considered tangentially the issue of employer's free speech under Section 8(c) of the Act, but has not directly considered the issue. While a reading of the post 1947 cases raises an inference that this Court considers employer's speech protected in the absence of coercion, it is now evident that there is an important need for this Court to speak directly on this issue. See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969); *N.L.R.B. v. Exchange Parts*, 375 U.S. 405 (1963); *N.L.R.B. v. United Steel Workers*, 357 U.S. 357 (1958).

indirectly subject to the Act and the Board's jurisdiction. In 1970, over 3.3 million workers were involved in work stoppages. The Board is faced with over 12,000 representation petitions and over 11,000 unfair labor practice charges annually. Close to 400 cases a year involving Board-related activities are heard in the federal courts.

As the numbers have grown, there has been a natural gravitation to Board decision making. While this delegation is necessary because of the increased work load and need for expertise, it is crucial that this Court establish principles to insure that congressional intent will not be thwarted by Board administration.

The Board cannot under the guise of "delegation for the purposes of implementation" be allowed to thwart congressional intent as clearly expressed in Section 8(c) of the Act; in this case the Board has done so, with the approval of the Court below, by choosing to substitute its judgment as to the scope of employer free speech for the judgment of Congress.

It is obvious that despite the weight of Circuit Court authority to the contrary, the Board will continue to unlawfully proscribe all employer communication not only in the Ninth Circuit but nationwide for the Board feels compelled to follow *only* the direction of this Court. As stated in *Iowa Beef Packers*, 144 N.L.R.B. 615 (1963):

> "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of the circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But is is not for a Trial Examiner to speculate as

to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act be achieved." 144 N.L.R.B. at 616.

The need for guidance from this Court is great in the area of free speech under Section 8(c) because, as this case exemplifies,[6] the Board has reverted to its pre-1941 position and has silenced the voice of employers in labor relations, despite the pre-1947 decisions of this Court and the 1947 Congressional directive that protects employer free speech in the absence of threat or promise. This case is ideal for the enunciation of guidelines because the factual issues are undisputed and the legal question clear: May the Board make unlawful an employer communication which does not contain any threat of reprisal or force or promise of benefit even though the communication may undermine the Union's organizational attempt where Congress has declared the communication to be lawful?

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[6]For other examples, see *Richman Brothers Co.*, 157 N.L.R.B. 1666 (1966) (the Board found employer in violation for telling employees "you people don't know what you are getting into with this union business." *Foster Co.*, 168 N.L.R.B. 83 (1967) (Board found unlawful employer telling employees because of the union's activities he felt he had been "knifed in the back"); *Golub Corp.*, 159 N.L.R.B. 355 (1966) (Board found unlawful an employer noncoercively advising his employees as to his opinion of the results of unionization.)

Conclusion.

For all the foregoing reasons, it is respectfully submitted that the Writ should issue.

Respectfully submitted,

LEON M. COOPER,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

U.S. Court of Appeals, Ninth Circuit (San Francisco).

National Labor Relations Board v. Deutsch Company, Electronic Components Division, No. 26168, June 23, 1971.

On application for enforcement of an order of the NLRB (73 LRRM 1156, 180 NLRB No. 1). Enforcement granted.

Jesse I. Etelson (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, with him on brief), for petitioner.

Frederick Richman (Leon M. Cooper, Cooper, Wyatt, Tepper & Plant), Los Angeles, Calif., for respondent.

Before DUNIWAY and ELY, Circuit Judges, and BYRNE,* District Judge.

Full Text of Opinion

PER CURIAM:—The Board has petitioned for the enforcement of its order relating to the Oceanside plant of the respondent. The Board issued an opinion, reported at 180 NLRB No. 1, 73 LRRM 1156 (December 12, 1969).

The thrust of the respondent's opposition to the petition for enforcement is that the Board's order is not supported by substantial evidence. We disagree. The record is replete with testimony which clearly establishes respondent's multiple violations of Section 8(a)(1) of the Act. Similarly, the Board's findings with regard to the violations of Section 8(a)(3) are supported by inferences drawn from the evidence. Contrary to respondent's view, these inferences are neither unreasonable nor are they without substantial basis in fact.

The Board's Order shall be enforced in full.

APPENDIX B.

Order Denying Petition for Rehearing.

United States Court of Appeals, for the Ninth Circuit.

The Deutsch Company, Electronic Components Division, Petitioner, vs. National Labor Relations Board, Respondent. No. 26,168.

Petition for rehearing denied.

Dated: October 8, 1971.

Duniway and Ely, Circuit Judges,
and Byrne, District Judge.

APPENDIX C.

Decision and Order.

United States of America, Before the National Labor Relations Board.

The Deutsch Company, Electronic Components Division and International Association of Machinists and Aerospace Workers (AFL-CIO) Case 21-CA-7989.

On April 3, 1969, Trial Examiner Louis S. Penfield issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices.[1] Thereafter, Respondent filed exceptions to the Trial Examiner's Decision, a supporting brief, and a request for oral argument.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the

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[1] No exceptions were filed to the Trial Examiner's failure to find these unfair labor practices.

[2] This request is hereby denied since, in our view, the record, exceptions and brief adequately present the issues and positions of the parties.

exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, The Deutsch Company, Electronic Components Division, Oceanside, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 1(a) and 1(b) and substitute the following:

(a) Discharging, laying off, suspending, eliminating overtime, denying wage increases, failing to transfer,

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[3]In the light of our other findings and the remedy provided therefor, we deem it unnecessary to decide whether Respondent violated Section 8(a)(1) of the Act by Supervisor Schum's photographing of union handbilling activity or by Respondent's rule requiring operators to stand while at work.

We agree with the Trial Examiner's findings of Section 8(a)(3) violations. In respect to the unlawful discrimination against employee Frances Montgomery, Respondent asserts that the Trial Examiner erroneously found that there was no explanation in the record for the abolition of Montgomery's tool crib attendant job. While there is some testimony showing that Respondent had shifted the tool crib attendant's tasks to other job classifications, this evidence does not affect our agreement with the correctness of the Trial Examiner's ultimate conclusion that Respondent unlawfully discriminated against Montgomery.

In adopting the Trial Examiner's conclusion that Respondent violated Section 8(a)(1) by invoking an unlawfully broad no-solicitation rule, we note that even if the language of the rule might be regarded as ambiguous, the manner of its enforcement makes clear that the rule was designed to inhibit all in-plant union activity. In agreeing that the rule violated the Act, Member Zagoria does not however rely on any asserted disparity as between union activity and United Fund solicitation.

or otherwise discriminating against employees in regard to hire, tenure of employment, or any term and condition of employment, in order to discourage membership in International Association of Machinists and Aerospace Workers (AFL-CIO), or any other labor organization, except as authorized in Section 8(a)(3) of the Act.

(b) Coercively interrogating employees concerning their union membership or activities, threatening them with reprisals and promising benefits to dissuade them from union and concerted activities, invoking and enforcing an unduly restrictive prohibition on union solicitation, assisting and inducing employees to repudiate the Union, and imposing more onerous work practices because of the Union.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists and Aerospace Workers (AFL-CIO) or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Delete the first paragraph in the Appendix ("Notice to All Employees") and substitute the following:

WE WILL NOT discharge, layoff, suspend, eliminate overtime, deny wage increases, fail to trans-

fer or otherwise discriminate against our employees in regard to hire, tenure of employment or any term and condition of employment in order to discourage membership in International Association of Machinists and Aerospace Workers (AFL-CIO) or any other labor organization, except as authorized in Section 8(a)(3) of the Act.

WE WILL NOT coercively interrogate our employees concerning their union membership or activities, threaten reprisals or promise benefits in order to dissuade them from union and concerted activities, invoke or enforce an unduly restrictive prohibition on our employees' union solicitation, assist and induce our employees to repudiate their union affiliation, or impose more onerous work practices because of the Union.

Dated, Washington, D. C.

December 12, 1969.

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX D.

Trial Examiner's Decision.

United States of America, before the National Labor Relations Board Division of Trial Examiners Branch Office San Francisco, California.

April 3, 1969

The Deutsch Company, Electronic Components Division and International Association of Machinists and Aerospace Workers (AFL-CIO). Case No. 21-CA-7989.

Jerrold H. Shapiro, Esq., for the General Counsel.

Cooper, Tepper & Plani by *Leon M. Cooper, Esq.*, of Los Angeles, Calif., for Respondent.

T. B. Aycock, of Long Beach, Calif., for the Charging Party.

Statement of the Case

LOUIS S. PENFIELD, Trial Examiner: This proceeding, with all parties represented, was heard before me in Vista, California, on September 17, 18, 19 and 23, and October 1 and 2, 1968, upon a complaint of the General Counsel and answer of The Deutsch Company, Electronic Components Division, herein called Respondent.[1] The issues litigated were whether

[1]The original complaint issued on June 7, 1968, and is based on a charge and amended charges filed with the National Labor Relations Board, herein called the Board, on March 13 and 28, and on April 5 and May 29, 1968, respectively. An amendment to complaint issued on June 26, 1968, and an amended complaint issued on August 26, 1968. Copies of the complaint, amendment to complaint, amended complaint, charges and amended

the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Upon the entire record, including consideration of the briefs filed by the parties, and upon my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a California corporation with a plant located in Oceanside, California, where it is engaged in the manufacture and sale of electrical connectors used by the aerospace industry. In the normal course and conduct of its business at the Oceanside plant, Respondent annually sells and ships goods valued in excess of $50,000 directly to points located outside the State of California. In the course and conduct of the same business at the Oceanside plant, Respondent annually purchases materials and supplies valued in excess of $50,000 which are shipped to it directly from points located outside the State of California. On the basis of the foregoing, I find that Respondent at all times material has been an employer engaged in a business affecting commerce within the meaning of Section 2(7) of the Act and that in accordance with existing Board standards assertion of jurisdiction over its business is appropriate.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers (AFL-CIO), herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The General Counsel contends that in response to the announcement of an organizational drive by the Union, Respondent engaged in various unlawful acts violative of Section 8(a)(1) which interfered with, restrained and coerced employees in the exercise of their Section 7 rights. The General Counsel further alleges that Respondent discriminatorily laid off 96 employees, that it discriminatorily selected and thereafter refused to reinstate four employees included in such layoff, that it discriminatorily reduced overtime for employees in certain departments, that it made discriminatory assignments to two employees, that it discriminatorily issued a warning to an employee for violation of an invalid no solicitation rule and thereafter failed to grant such employee an increase in pay and discriminatorily imposed a 3-day suspension upon him, and that it discriminatorily discharged another employee. It is contended that each discriminatory act came about as a show of Respondent's opposition to the efforts of the employees to pursue organizational activities on behalf of the Union and was thus violative of Section 8(a)(3) of the Act. Respondent denies that it engaged in any conduct interfering with Section 7 rights of its employees or that any of the acts attributed to it were unlawfully motivated within the meaning of Section 8(a)(3).

A. *The Setting*

The Deutsch Company maintains its corporate headquarters in Los Angeles, California. The chairman of the Board, Alex Deutsch, and the president, Carl Deutsch, have offices there. The Electronic Components Division consists of two plants—one located in Banning, California, and the other at Oceanside, California.

This proceeding is concerned solely with the Union's effort to organize the Oceanside plant.[2]

Leonard Brooks is a vice president of Respondent and general manager in charge of operations of Respondent's Oceanside plant. Brooks is assisted by Dudley Kebow, production control manager, Phil Flory, factory manager, Fran Gallagher, quality control manager, and John Wolcott, personnel manager. The employees are directly supervised by a group of general foremen in charge of different operations, and by shift foremen who work under the general foremen. It is conceded, or otherwise established, that at all times material to this proceeding the following persons were supervisors within the meaning of the Act: Joe Brent, Everett Clayton, Bob Erickson, Ken Hall, Dale Hatter, Don McClellan, George Mathews, Hank Pihl, Bernie Pratschner, Kenton Quick, Pat Reilly, Willie Roemhild, Paul Rule, Paul Saupstad, Chris Williams, Jack Jones, and Ray Schum.[3]

All references to the term Respondent, unless otherwise noted, should be construed to refer to the Ocean-

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[2]In 1966, United Steelworkers of America, AFL-CIO, conducted an organizational drive at Respondent's Banning plant. In an unfair labor practice proceeding involving the Banning plant, the Board found that Respondent had violated Section 8(a)(1) of the Act by maintaining and enforcing an unlawful non-solicitation and non-distribution rule, and by unlawfully assisting employees to withdraw their union support. The Board also found that Respondent had engaged in unlawful discriminatory conduct by imposing disciplinary suspensions on two employees for breaching an invalid no-solicitation rule. See *The Deutsch Company, Electronic Components Division,* 165 NLRB No. 5.

[3]Respondent initially did not concede that Jones and Schum, both of whom work in the personnel department, were supervisors. The record establishes, however, that both play a direct role in the hiring of employees, and that each exercises a degree of authority which would constitute him a supervisor within the meaning of the Act, and I so find.

side plant. Respondent initially commenced operations at Oceanside in 1965 in a rented building which it occupied until construction on new facilities had been completed in November of 1966. In March of 1966 there were 110 employees engaged in production work. In November of 1966 there were 300, and by late 1967 there were approximately 570 persons so engaged. At all times Respondent's business has been to manufacture electrical connectors of varying sizes and complexity for use by the aerospace industry. Initially the least skilled aspects of the work, such as assembly and shipping, were performed at Oceanside on parts obtained either from other plants of Respondent or purchased from other manufacturers. Subsequently the more skilled operations including machining, molding, and the production of machine tools were added and carried on at Oceanside. By the end of 1967, the Oceanside plant was a substantially integrated operation with most of the components of the connectors and the tools needed to produce them manufactured there. In some instances, however, it is still necessary, or advantageous, to obtain certain parts from other sources.

Employees coming to work for Respondent are given a booklet entitled "Welcome" which undertakes to describe the Company's product and to set forth the benefits and work rules which are to apply to employees generally.

Early in March several of Respondent's employees approached union representatives to discuss the possibility of organizing the employees. The Union's organizing campaign was lauched by a letter from a representative or District Lodge 50 which purported to advise Respondent that its employees had requested that

an organizing campaign be undertaken, and that the Union was in the process of initiating it. The letter stated that five named employees would be engaged in lawful organizing activities during their free time, and expressed the hope that "they would be extended the courtesy normal under these conditions."[4] This letter was dated March 7, 1968, and it is conceded that it was received by Respondent on Monday, March 11, 1968. The March 7 letter was followed by two others dated March 8 and 12, respectively, in which the Company named five additional employees who would likewise be engaged in organizing activity.[5]

On April 5, 1968, the Union filed a representation petition with the Board in a proceeding known as 21-RC-10821. Following a hearing, a Board election was conducted among Respondent's employees on June 28, 1968. Of approximately 462 eligible voters, 163 voted for the Union, 275 for no union, with 8 challenged ballots. Thereafter, the Regional Director certified the results of such election.

B. *Respondent's Response to the Union's Organizing Campaign*

Although Respondent did not reply in writing to the letters of the Union regarding its organizing campaign, its reaction was immediate and direct, and it is the character of such response as evidenced by written

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[4]The following employees were named: William K. Baer, Walter R. Einertson, Scott H. Mowery, Tony W. Thomas, and Jack Clinton Ford, Jr.

[5]These included David E. Hodge, Herbert Dostler, Mario B. Silva, Carlos Diz, and Frances S. Stratton. It was pointed out that there might be other names added from time to time and that persons engaged in organizing would be wearing a committeeman's badge.

communications to employees, the invocation or enforcement of work rules, unlawful interrogations, threats by supervisors, and various alleged discriminatory action taken against employees that constitute the subject matter of this proceeding.

1. The alleged unlawful no-solicitation rule

In the booklet entitled "Welcome" noted above, we find the following rule regarding solicitation:

> COLLECTION AND GIFTS:
>
> The solicitation of funds for any purpose, the sale of tickets for all purposes, the operation of lotteries and raffles, and the solicitation of membership in organizations *during working hours on Company property are absolutely prohibited.* [Italics added.]

It is the General Counsel's contention that this rule is invalid on its face inasmuch as it prohibits solicitation on company property at all times. The existence of this rule is not denied, and various aspects relating to its enforcement following the commencement of the union organizational drive will be set forth below.[6]

2. The letters to the employees

On March 13, 1968, two days after first receiving notification regarding the Union's organizational drive, Respondent sent a letter to each of its employees. This letter, among other things, advised the employees that Respondent had been notified that organizing was underway. The letter noted the names of employees designated by the Union as committeemen characterizing them as

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[6]The same rule was in effect at Respondent's Banning plant, and its legality was challenged there. In *The Deutsch Company, Electronic Components Division, supra,* the Board found the rule to be "unlawfully broad."

"paid professional union organizers." Respondent represented that two of these committeemen "had already changed their minds and had tried to turn in their union badges." The latter were not named. The letter went on to say:

> Some of you will be approached and asked to sign an authorization card. *Don't do it!* The card states that signing will not obligate you financially. Do you know of any union that does not collect dues? The card also states that all cards are kept confidential by the union and the government. This is not necessarily true. It wasn't true for the 10 people listed above. The card also asks for your address and phone number. Do you really want these people to have such information?
>
> The card does not state that you could be forced to join a union against your wishes. The card does not tell about union strikes such as the 8-month old copper strike. It doesn't tell about the loss of jobs and income, about the violence that has happened during the Los Angeles Herald-Examiner strike. The card asks a lot of you and gives you nothing in return.
>
> The Deutsch Company does not believe that you need a union, and believes that a majority of you feels the same way.

On March 15, Respondent sent another letter to each of its employees which I quote in its entirety: (The italics is as it appears in the letter.)

> March 15, 1968
>
> To All Employees:
>
> Many of you have been approached to sign a "union authorization" card. You are told that you

are under no obligation if you sign their card—*this is a lie!* By signing a union card you are letting the union be your sole representative in dealing with the company. As your representative, you could be forced to pay *dues, initiation fees, fines,* and assessments or *lose your job* without any election. A union has the right to call a strike, whether you want to strike or not.

Strikes can last for months or years. Strikes lead to *violence.* You may not be safe in your own home. Striking employees, in many cases, lose their job by striking. *All striking employees lost wages that they can never regain.*

These union organizers will tell you that, if you do not like the union that you can easily change your minds and go non-union again. *This is a lie.* It is practically impossible to remove a Union as a representative.

One thing that unions will tell you is that they will get you job security if you will pay them dues. *This is a lie!* Some of your present employees have worked in union plants and have lost their job because of strikes, plant shutdowns, and layoffs.

The union will tell you that you will be represented by a committee of fellow employees who work here at Deutsch. Read the *union authorization card again.* It states that the *union* will represent you. If you sign it, you are asking the government to recognize *the union* as your agent. No election, no committees, no nothing.

Employees have been coerced into signing union authorization cards and have complained to the

company. *The company will not stand to have its employees intimidated, coerced, or threatened.*

The company has filed *charges* with the government against the union and its organizers and intend to bring them to justice and have them restrained.

However, even if the authorization cards were signed under duress, they can still be used by the union to lock you into their union.

If you have changed your mind, been misinformed, coerced, threatened, or intimidated into signing an authorization card, or if you think someone else might have sent in a card with your name on it, you can revoke that card by mailing the enclosed post card. The card will be kept in confidence by the National Labor Relations Board.

The company can protect you at the plant from threats, coercing, and intimidations if you report it to your supervisors.

The company can not protect you at your home from such threats, coercion and intimidations. If such occurs, call the local police for protection.

THE DEUTSCH MANAGEMENT

Attached to this letter was a stamped postcard addressed to the Board's Regional Office in Los Angeles which contained the following legend:[7]

Re: Deutsch Electronic Components Division

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[7]At the Banning plant, Respondent sent an identical letter to the employees during an organizational campaign there. The Board found it unlawful for "an employer to attempt to assist [the employees in revoking their cards by furnishing to them without a demonstrated need or request therefor, addressed stamped postcards which required no more than their signature to notify the Board of the revocation of their authorization cards."

Gentlemen

Recently I signed a union representation card of the International Association of Machinists because of misinformation or duress.

I hereby revoke my authorization for all purposes.

SIGNATURE DATE

3. The alleged unlawful conduct of the supervisors

The General Counsel contends that Respondent, as part of its attack designed to undermine union support, permitted its supervisors to engage in widespread and varied unlawful activity calculated to interfere with the employees in the exercise of their statutory rights. This conduct is alleged to have commenced on March 11, concurrently with Respondent's first knowledge of the Union's organizational drive, and to have been particularly intense during the week of March 11 to 15. The record discloses the following:

(a) Employee Monica Felton testified that on March 15 Supervisor Everett Clayton called her into his office and in the course of a conversation with her asked her "if [she] had heard anything about the Union," and then said "if anyone was to approach [her] on the Union, to let him know." Employee Wilma Sampson states that on the same day, Clayton called her into his office and, among other things, asked her "if anyone had approached [her] about the Union." Sampson states that Clayton followed this by asking her what

she thought about the Union, and that she had replied that she would not join even if approached.[8] Clayton was not called as a witness by Respondent.

(b) Frances Montgomery testified that on or about March 14 Supervisor Ken Hall came to her place of work, asked if she had heard about the Union, told her that if the Union came in there would be a strike, and asked who would pay the bills. Montgomery states that Hall then remarked that "if the Union came in . . . we won't have any profit sharing."

Walter Einertson, who wore a union committeeman's badge to work for the first time on March 11, testified that on that day Hall approached him stating, "What the hell are you doing getting involved in this?" Hall went on to say that he regarded the Union as "no good and rotten," and then said "you were in line for a good job, but you just screwed yourself up when you put that badge on."

Hall does not specifically deny the conversation with Montgomery. He does no more than state in general and conclusionary terms that he made no threats to anyone to discontinue benefits if the plant became organized. Hall does not deny the statements which Einertson attributes to him. Under the circumstances, I credit the testimony of both Montgomery and Einertson, and find that Hall spoke to them in substantially the manner which they relate.

(c) Consuelo Miller commenced wearing a union committeeman's badge on March 25. On March 26,

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[8]In its brief Respondent asserts that Sampson did not properly identify Clayton. I disagree. Although Sampson, in her testimony, did refer to the person in question as "Everett," it is abundantly clear from her testimony as a whole that she was referring to Supervisor Everett Clayton.

Supervisor Mathews came to her place of work and, observing the badge, stated "Oh, I see you decided to go against us." When Miller denied that this was the case, Mathews stated, "Well, you decided to become our enemy." When Miller signified that she didn't wish to pursue further discussion along these lines, Mathews remarked that she should remember "the rules and regulations when you were hired here and one was no soliciting." Mathews went on to tell Miller that she "could not solicit for the Union at any time on company property be it [her] breaks, lunch, before or after work." When Miller replied that she should be able to express her opinion, Mathews repeated "I'm telling you, you cannot solicit for the Union or talk about it on company property."

Miller testified that in the fall of 1967 she had been approached by Supervisor Don McClellan who had asked her to sign a card authorizing Respondent to deduct monies for the United Crusade. At that time, Miller states she had also observed McClellan soliciting other employees for a similar purpose. She told this to Mathews when he warned her about union solicitation in March and, according to Miller, Mathews replied that "the company could do what it wanted." The undenied testimony of employees Einertson and Hodge corroborates Miller to the effect that they too were solicited in November or December 1967 by Respondent's supervisors for the United Crusade, and that such solicitation took place during their working time and in their working areas. Mathews was not called as a witness.

(d) Mario Silva wore a union committeeman's badge to work for the first time on March 11. Silva states that on that same day Supervisor Pat Reilly called him

into his office, "informed [him] of the rules of the company against solicitation on company property" and told him that this meant he "could not solicit or hand any cards or letters or anything, even talk with anybody about the Union." Silva asked what he might do if approached by somebody and asked about the Union, and Reilly replied "Well you can't answer them, you can't talk to anybody about the Union." Silva then asked what would result if he violated the rule and Reilly replied "there would be a written warning first and second step would be a 3-day suspension," and with further violations "termination from the company." Silva testified that during the course of this same conversation Reilly also told him that from then on he would not be permitted to leave the area where his machine was located, and that he was not to talk to anybody or approach anyone working in his department. It stands undenied that prior to March 11 it had been Silva's normal practice to leave his department on occasion to help other employees who might be having trouble with their machines. Silva states that prior to March 11 neither Reilly nor any other supervisor had signified such practice to be inappropriate.

Silva testified that on an occasion occurring some time in April 1968 Reilly had told him that "because you put that badge on you ruined your chances to get anywhere with the company." Silva states that on a variety of occasions Reilly had remarked to him that the Union was composed of crooks, that the employees would get nothing from the Union, and that should there be a union "the company was going to take the benefits off, like profit sharing, stuff like that, they were going to take it off and we were not going to get that much more." Reilly was not called as a witness by Respondent.

(e) Employee William Frankenberg testified that on or about March 14 Supervisor Wilfred Roemhild approached him at his machine and started talking about the Union, stating that people who belonged to unions had to pay dues and assessments and that there were frequent layoffs in union companies. Frankenberg testified that he then showed Roemhild the March 13 letter Respondent had sent to the employees, and asked Roemhild if it would be permissible to show it to the other employees. When Roemhild replied in the affirmative, Frankenberg then asked him if he might also show a union letter to the employees, to which Roemhild stated "no, that would be soliciting," and "if you solicited on company property, you were subject to being dismissed." Roemhild does not deny these statements which Frankenberg attributes to him.

Frankenberg testified that on another occasion, also during the week of March 11, Roemhild had told him that "if the Union came in you would not be allowed to leave your machine." This also is not denied by Roemhild.

Frankenberg states that prior to the start of the Union's organizational campaign he and two other grinders, Herb Dostler and Bill Fincher, had been permitted to either stand or sit at their machines depending on the work requirements of the particular job in which they might be engaged. Dostler was a union plant committeeman who wore a badge. Frankenberg states that some time between March 13 and 15 Roemhild had told him and the other grinders that they would no longer be allowed to sit down at work at any time explaining that "management frowned on that." Roemhild insists that it had always been the rule that grinders were not to sit at their machines inasmuch as they

could work more effectively while standing and that to sit down might be dangerous. Roemhild conceded, however, that there might be conditions and particular types of jobs at which it would be appropriate for grinders to sit. Roemhild fails to explain why he invoked a stricter rule at this time than he had theretofore been applying.

According to the undenied testimony of employees Edwin Ray and Sebastiano Randone, Roemhild, questioned each of them during the week of March 11 about the Union, asking Ray "how did [he] feel about the Union," and Randone what he "was thinking about the Union and this union business." Roemhild did not accompany such questioning with any explanation of his purpose or by giving any assurance against retaliation.

(f) David Hodge testified that he wore his union committeeman's badge to work for the first time on March 11. Hodge states that on that day Supervisor Paul Rule called him into his office and questioned him as to "why [he] wanted to support the Union." Hodge told Rule that he felt it to be against company policy to discuss union matters on company time. Rule thereupon told Hodge that he could not talk about the Union at any time on company property. Later that same day, Hodge states that Rule told him he "was instructed to watch [Hodge] while [he] was at the plant to make sure that [he] did not solicit anybody at any time on their property for the Union." Rule does not specifically deny mentioning the no-solicitation rule to Hodge although he does deny that he told Hodge that he had been assigned to watch him.

Hodge testified that on or about March 13 Rule had called him to his office, told him that unions were

no good, cited examples of several current strikes, stated that these did not get people anything, and that if employees were to go on strike they would be replaced. According to Hodge, during the course of this conversation Rule used a vulgar expression, commenting that he had enough on Hodge to cause him considerable trouble. At this point, Hodge states that he asked Rule what might result should he change his mind about the Union. Rule replied "that the company would expect [him] to talk to other people and change their minds also." While Rule does not specifically deny each of these statements, and even acknowledges talking with Hodge about his committeeman's badge and the Union, his version of what appears to have been the same event is somewhat different. Rule claims that Hodge came to his office and expressed the view that "he had lost a lot of face" as a result of putting on the badge, and that he "wanted to know what possible chance it would be to make some kind of restitution to get himself back in good standing with his job in the company." Rule states that he told Hodge that this would be entirely up to him. Rule denies that he ever used the vulgar expression which Hodge attributes to him. I do not regard Rule's testimony as altogether inconsistent with that of Hodge. Both agree that Hodge sought Rule's advice as to how to regain good standing with Respondent after appearing with a union badge. This suggests that in some way Rule or some other management representative had impressed Hodge that wearing such a badge might have an adverse effect on his future. Hodge impressed me favorably as a witness. The general character of Rule's testimony, considered in conjunction with undenied statements of a similar nature attributed to other

supervisors, makes it likely that the version offered by Hodge is the more accurate, and I so find.

Hodge further testified that while conversing with Rule on March 11, Rule told him that thereafter he would be restricted to his working area, and that if he had need for any equipment in his work another employee would get it for him. Prior to this, it has been the practice of Hodge, and others, to leave their work areas to go to the tool crib, the gauge laboratory, or the grinding room. Hodge states that he had never been told that such activity was restricted. Walter Einertson, also a union committeeman, testified that he, too, was notified by Rule that in the future he was to be similarly restricted to his work area. Einertson states that Rule told him "as long as [he] was wearing that badge [he] would be confined to [his] work area, and that if [he] needed tooling, he would take care of it. If [he] needed gauges that the coordinator or lead man would take care of it." The testimony of Einertson stands undenied. Rule does not deny that at about this time one employee was designated to supply others with such materials as they might require. Rule does not, however, explain why such work restrictions were imposed concurrently with the start of the Union's organizational drive, and the appearance of union committeemen badges on some of the employees.

(g) Alice Peneku testified that during the first week of March Supervisor Chris Williams asked her if she had seen a union card and if she had signed one. She states that at the same time Williams had commented that she had been doing a good job. During the week of March 18, Frances Montgomery testified that Williams approached her at her work station asking "What

do you think about the Union?" In neither case did Williams explain the purpose of his questioning or give assurances against reprisals. Williams was not called to testify.

(h) Employee David Hodge testified that on March 11 Supervisor Joe Brent approached him and queried him about the Union. When Hodge replied that he believed it to be against company policy to discuss such matters during working hours he states that Brent had remarked that if he did not want to discuss it, it was up to him. At this point, however, Brent called Hodge's attention to the no-solicitation rule, stating that Hodge "couldn't solicit on company property at any time." Hodge was one of those who had formerly been solicited by a supervisor regarding the United Crusade.

William Frankenberg testified that shortly before the March 15 layoff Supervisor Brent had "come to [his] machine and told [him] that there would be no soliciting on company property, or before work or lunch time or break time."

Carlos Diz testified that on or about March 13 Supervisor Brent had approached him and questioned him concerning his interest in the Union asking why he wanted the Union and thereafter engaging in a discussion with him about union organization. Brent acknowledges having had a conversation with Diz about union cards, but he insists that Diz initiated this conversation, explaining that his wife was unhappy because Diz had become a member of the union committee. Brent states that he explained to Diz that if he wished to drop out of the Union he need do no more than inform the Union that he no longer wished to be a member of the committee.

Brent was unable to recall having had a conversation with Frankenberg about the Union. He recalls talking with Hodge about the Union, and admits that he talked with a great number of employees, including Hodge, asking them "How was the organization of the plant coming along as far as recruiting members?" Considering Brent's admission that he talked with many about the Union and the fact that his alleged remarks to Diz and Hodge are not only mutually consistent but are also consistent with undenied testimony of other supervisors on the same subject, I credit the versions of Diz and Hodge and find that Brent made the statements which they attributed to him.

(i) Employee Consuelo Miller testified that Supervisor Don McClellan approached her on or about March 18 and initiated a conversation concerning work in general which led into an inquiry regarding union matters and Miller's feeling about the Union. Miller states that McClellan commented that a union would do nothing for them, and a lot of people would be disappointed because they would not get what they wanted. Shortly thereafter, but on the same day, McClellan returned and stated to Miller, "Connie whether you advocated or are sympathetic toward the Union I want you to know that you cannot solicit for the Union at any time on company property. That includes your breaks, your lunch hour, before and after work." Miller commented that surely she had the right to express an opinion, whereupon McClellan reaffirmed his position stating "You cannot solicit for the Union or talk about the Union on company property." On the same day, Miller states that McClellan, who had formerly sat at a table in the cafeteria with other supervisors, commenced sitting at a table where Miller sat

with other employees and appeared to be noting her communications to other employees. She states McClellan continued this practice until he was transferred to another department in April.

According to the undenied testimony of Monica Felton, when she returned to work in April after the March 15 layoff, Supervisor McClellan, after giving her some instructions and pointing out certain rules and regulations, told her that if they ran out of work she would be moved into another department, adding that we are able to do this because we do not have a union in here, "but if we had a union, they would send you home."

Employee Miller further testified that almost daily between March 18 and April 1 McClellan would approach her at her work station and query her as to why she was "against the company."

Employee Felton further testified that on or about March 8 McClellan had approached her and asked her "how she felt about the Union" and how she felt about the stand the company was taking against the Union. On or about May 13, when Felton first appeared at work with a union committeeman's badge, she states that McClellan had asked if she attended a union meeting held on May 11. Felton acknowledged that she had, and at that point McClellan asked her what had happened at the meeting, asking "how many people do you think are for the Union?"

Although McClellan was called as a witness, he does not deny the foregoing statements which Miller and Felton attribute to him, except that he claims he did not seat himself in the cafeteria in such a manner that he could observe Miller.

(j) Sandra Jones testified that she came to work on March 18 wearing a union committeeman's badge. She states that on the same day Supervisor Hank Pihl called her into his office and asked "how come you're wearing that badge?" Pihl then went on to relate all the benefits that the employees were then getting stating "that if the Union got in we wouldn't be getting any more of these because it would cost the Company too much money." She states that Pihl then asked "what the Company has done to me to make me go against it" and that at this point she had started crying. On a later occasion, Jones testified, Pihl had approached her at her work station and had asked her "if [she] was ready to take [her] badge off and he told [her] not to wait too long." She states that Pihl then commented about various benefits Respondent had to offer and told her "we'd lose them." Subsequent to this Pihl again asked "if she had changed [her] mind yet." And when she had inquired as to what would happen if she took off the badge, Pihl said "nothing would happen; that all I'd do is to sign a little piece of paper." She inquired as to purpose of the piece of paper, and Pihl said it would "prove that [she] had been misled into signing a card." Pihl's version of his encounter with Jones is that she came to him to tell him that she had been misled into signing a union card, and wanted to know what she could now do to change the situation. Pihl testified that he told her, in substance, that he could give her a card to sign whereby she could repudiate the Union. Pihl does not specifically deny any of the other statements that Jones attributes to him, stating only that he neither harassed Jones or any other employee, or represented to anyone that if the plant were organized there would be a loss of bene-

fits. In view of the general conclusionary nature of Pihl's denials, his admission that he offered to aid Jones to repudiate the Union, and the consistency of the testimony of Jones and that of other employees as to what Pihl and other supervisors had told them, I credit the version of Jones and find that Pihl made the statements which Jones attributes to him.

Sidney O'Leary testified that Supervisor Pihl spoke to him about the Union sometime in the latter part of March. O'Leary states that he was called to Pihl's office on this occasion, and at the time Pihl had asked him why he thought it would be necessary to have a Union at the plant.

Jack Ford, a union committeeman, testified that in the latter part of May Pihl had called him into his office and asked Ford "[Why] he had decided to work for the Union, what [his] reasons were." Employee Ford further testified that on another occasion later in May Pihl had questioned him concerning his reasons for working for the Union and had commented that "by injecting a third party . . . that it could spoil the relationship between employee and employer" and an employee "would be assigned to certain jobs to do and that would be the only job that [he] could do . . . [he] couldn't progress from machine to machine . . . he couldn't advance very far with the Company." The testimony of both O'Leary and Ford stands undenied.

According to the undenied testimony of employee Einertson on March 11, when he reported wearing a union committeeman's badge, Pihl had spoken to him saying that he "was not allowed to solicit on company property at any time during the lunch hour, break, or for that matter on company property, or [he] would be disciplined."

(k) Scott Mowery, a union committeeman, wore his committeeman's badge to work for the first time on March 11. When this was seen by Supervisor Kenton Quick, Quick "told [him] that [he had] better forget about that, that it would just lead to nothing but trouble." Later on the same day Quick asked Mowery what he "hoped to gain from the Union." Shortly after this, Quick called Mowery into his office and told him that he should not support the Union, that it was comprised of undesirable people who engaged in violence and criminal activity, and that if Mowery "pursued this that it would lead to nothing but trouble." Later in the day, Quick again called Mowery into his office and told him that he was giving him official notice "that solicitation was against company policy" and that Mowery "wasn't allowed to solicit at the company at any time." Mowery asked Quick if he regarded authorization cards as soliciting, and Quick told him that he did. Mowery asked if Quick would so instruct him in writing, but Quick declined to do so. Mowery then asked Quick what would happen if he engaged in solicitation, and Quick replied "that [he] would be gone." During the course of one of Mowery's conversations with Quick, Production Manager Flory was also present. According to Mowery, Flory asked him what his problems were, and why he had not talked to Flory about them instead of seeking the Union. Mowery told Flory that he felt the employees needed some help in regard to improving working conditions, whereupon Flory told him that unions have caused people to lose work, have imposed fines and assessments on them, and have even caused people to be fired.

On another occasion between March 11 and 14, Mowery states Quick approached him and asked to

see an authorization card. Mowery said he could not give him one during working hours, and Quick asked where Mowery kept them. Mowery explained that they were in his toolbox. Quick went to the toolbox and took a card and examined it. After examining it, Quick stated "You realize this thing is nothing but troubles for you. . . . you'd better give it up. You're going to be going."

Mowery states that the last conversation he recalls with Quick took place on March 14, at which time Quick asked him why he continued "to press the issue with the Union," commenting that the Union was comprised of "nothing but gangsters, crooks, communism, and they kept people on strikes, and they would just lead to nothing but trouble. . . ." After Mowery had responded that he felt that the Union could be of assistance to the employees, Quick stated "I'm not even going to talk to you no more about it. I can't change your mind."

Employee Joan Peeden first wore a committeeman's badge on March 18. She testified that on March 13 Quick had called her into his office and told her that should he see her talking to Scott Mowery, he would consider it "detrimental to the company and take action." Peeden testified that just prior to this she had passed Mowery's machine either on the way to the rest-room or to a coffee break, and that she had spoken to Mowery in passing as she had done frequently before without reprimand. Later in the day, according to Peeden, Quick told her, "He'd gotten onto [her] that morning because of the mess that was going on." The next morning at the start of her shift, Quick called Peeden to his office and told her that she was receiving a raise

in pay. At the same time Quick told her that the employees did not need a union, made some comments about the copper strike, and stated that "we did not need a middle man there." Peeden was not expecting a raise at this time.

On or about March 13, employee Jack Ford, who had commenced wearing his union committeeman's badge on March 12, was called into Quick's office and told by Quick "that solicitation was against the company policy." Ford asked if this applied to union authorization cards, and what would result if he passed them out. Quick responded that in such a case he "could be terminated." On March 13 or 14, Quick came over to Ford's machine and after some discussion as to the job upon which Ford was working told him "that it was too bad [he had] decided to work for the Union, because [he] could have gone somewhere with the Company."

Neither Quick nor Flory were called as witnesses by Respondent.

(1) On March 26, Ray Schum, supervisor in the personnel department, took pictures of employees distributing union handbills on an access road leading to the Oceanside plant. He was observed pointing his camera at both employees handing out handbills and those receiving them. Schum admits engaging in such photographing. He states that Personnel Manager Wolcott instructed him to do so because Respondent had received complaints that the handbilling created a traffic hazard and it sought evidence to support an injunction. There is no evidence that such complaints had been received prior to March 26.

C. *The Conduct Alleged as Discriminatory Within the Meaning of Section 8(a)(3) of the Act*

1. The warning to, the failure to grant pay increases to, and the suspension of Mario Silva

Mario Silva commenced working for Respondent in 1967 as an automatic screw machine operator. He came to work on March 11, 1968, wearing a plant committeeman's badge. As set forth above, he was warned at this time by his supervisor, Pat Reilly, against soliciting on company property, and forbidden by Reilly to leave his work area, talk to other employees in his department, or sit down while he was working. In addition, it stands undenied that at some time during the month of April Reilly informed Silva that by putting on the union badge he had ruined his chances of advancement. It is also undenied that between March 11 and April 30 Reilly engaged Silva in conversations almost daily, during the course of which Reilly characterized the Union in a derogatory manner.

On March 26, Respondent issued a written warning to Silva charging him with soliciting for the Union. Silva testified that Reilly had explained to him that someone had signed a statement to the effect that he had been solicited by Silva to join the Union while in the cafeteria having lunch. Silva denied that he engaged in conduct of this nature and asked Reilly to name the person charging him with this conduct. Reilly declined to identify such person, or to show Silva an affidavit which this individual allegedly had signed. Silva then pursued the grievance procedures set forth in Respondent's "Welcome" manual by lodging a written grievance asserting that he had not engaged in the solicitation as charged, and requesting that he

be given an opportunity to confront his accuser. Silva's grievance was considered by Production Manager Phil Flory who issued a written decision reciting the basis for the warning notice to have been a notarized statement from an employee. Flory held that Silva was well aware of the existence of a no-solicitation rule, and ruled that "because of the need to protect the well-being of the employees not interested in unionization, the identity of the employee will not be revealed." Flory ruled Silva's grievance to be without merit. Silva then took an appeal to the next step in the grievance procedure. This resulted in a written decision signed by Leonard Brooks, Respondent's vice president and plant manager at Oceanside. Brooks affirmed Flory in all particulars.

When Silva had commenced work for Respondent on April 7, 1967, he had been told by Supervisor Reilly that if he did a good job he would receive a raise every three months. During the course of his employment, Silva received three pay raises, the last one in the amount of 15 cents an hour on January 1, 1968. No raise was accorded Silva on April 1, 1968, and Silva lodged a protest with Reilly. Reilly's immediate response, according to Silva's undenied testimony, was to state that "because [Silva] had joined the Union and, you know, gone against Company rules, that [Silva] was, you know, didn't deserve to get a raise, and that's about it." Silva protested that his union activity had not affected his work, and that it should not affect his being granted a raise to which he was otherwise entitled. An argument ensued between Silva and Reilly during the course of which Reilly stated "because you put that badge on, you ruined your chances to get anywhere in the Company." Subse-

quent to this, Silva filed a written grievance with respect to the raise issue. Plant Manager Phil Flory responded in writing by reciting that on October 26, 1967, Silva had received a verbal warning for absenteeism, and on March 26, 1968, a written warning for his solicitation. Flory also noted Silva to have been absent on February 12 and March 22, 1968, and to have left work early on March 27 of that same year. Flory then ruled that increases were given on a merit basis, and that Silva had forfeited his right to one "because of his excessive absenteeism and *disregard of Company rules.*" [Italics added.] Silva appealed Flory's ruling, and on May 13, 1968, Plant Manager Leonard Brooks signed a decision citing that he had reviewed the circumstances surrounding Silva's grievance, and noted that between April 11, 1967, and April 1, 1968, Silva had been absent eleven times, late once, and had left work early five times, that this indicated such a poor attendance record and lack of interest in his job, that Brooks was supporting Flory's ruling denying the increase. It was not shown that at any time during this entire period Silva had had an unexcused absence, or had received warnings with regard to his attendance.

On May 1, 1968, Silva was suspended from work for three days. He received notice of such suspension in a telegram from Ray Schum, of Respondent's personnel department, which read as follows:

> DO NOT REPORT FOR WORK TONIGHT. YOU ARE HEREBY PLACED ON THREE (3) DAYS DISCIPLINARY SUSPENSION FOR YOUR CONTINUED VIOLATION OF COMPANY RULES. ON MARCH 11 AND APRIL 4, 1968, YOU WERE GIVEN VERBAL WARN-

INGS AND A WRITTEN WARNING WAS ISSUED ON MARCH 26, 1968. REPORT FOR WORK AT THE BEGINNING OF YOUR REGULAR WORK SHIFT MONDAY, MAY 6, 1968.

The incident which gave rise to this notice of suspension occurred when Silva had been leaving work at the end of his shift on April 30. According to Silva, he had a union leaflet in his possession and he was in the process of putting it inside his jacket to serve as additional lining against the wind while traveling home on his motorcycle. An employee named Trexel, who was standing nearby, observed Silva putting the leaflet inside his jacket, grabbed it from Silva's hand, and commenced reading it. Supervisor Reilly observed this and came over immediately and accused Silva of handing out pamphlets for the Union. Silva told Reilly that he had not given the pamphlet to Trexel, but that Trexel had taken it from him without his permission. Trexel affirmed to Reilly that this was the fact. Nevertheless, Reilly ignored Trexel, and charged Silva with handing out papers for the Union on company property, after having been earlier warned that this was against the rules. Neither Reilly nor Trexel testified, and Respondent offered no other explanation for this suspension.

2. The alleged discriminatory work assignments to Consuelo Miller and Frances Montgomery

Consuelo Miller came to work for the first time wearing a union committeeman's badge on March 25. As recited above, Supervisor McClellan spoke to her at this time about it, and later kept watch on her conduct in the cafeteria in the manner described above. We have also seen that Supervisor Mathews had

commented to Miller on her badge and had warned Miller against soliciting or talking about the Union on company property.

On March 26, 1968, Mathews called Miller and two other employees, Ferguson and Pedroza, who like Miller were also silk screeners, into his office and informed them that all three were being assigned to work on molding machines. Commencing on March 26, and continuing for a period of three weeks thereafter, Miller operated a molding machine. At the end of this time, she returned to her job as a silk screener. Ferguson and Pedroza operated molding machines for only two days, after which they were transferred to jobs on the assembly line at which they remained during the entire three-week period that Miller worked on the molding machine. It stands undisputed that during this same period three other molding machine operators were transferred to assembly jobs. None of the employees who were moved to the assembly line wore union badges. The record establishes that the work on a molding machine is more onerous than either silk screening, assembly line work, or trimming, and that the employees so regard it. Miller was qualified to perform all three jobs. Supervisor McClellan states that he kept Miller on the molding machine because she was the senior silk screener, and he felt that during the lull she might be needed to do silk screening in cases of emergency, thus it would be desirable to keep her close at hand. However, only once during the period was Miller called upon to do silk screening, and then only for a period of one hour. Moreover, Miller testified, without dispute, that while operating the molding machine she had observed two other molding machine operators, holding an even higher labor grade classifi-

cation than her own, assigned to trimming work. This was a far less burdensome job than work on a molding machine. Miller complained about this treatment to McClellan but received no satisfaction from him. She then took up the matter with Personnel Manager Wolcott. According to Miller's undenied testimony, Wolcott stated "Well, you know when you came in with that badge you set yourself apart from anybody else." Wolcott follows this by stating, "You understand what I'm trying to tell you."

Frances Montgomery had been employed by Respondent since November 16, 1965. Since July of 1966, Montgomery had been the only female tool crib attendant on the day shift. As recited above, on March 18 she was questioned by Supervisor Hall about the Union. On March 21, she was called into the personnel office and told by Ray Schum that "due to a reduction in force they would no longer need a tool crib attendant, that [she] could be transferred to a molding machine." Montgomery told Schum and Foreman George Mathews that it was impossible for her to work on a molding machine because she was unable to stand for any prolonged period of time. She specifically asked if there was any other work that would not involve standing to which she might be transferred. Schum replied in the negative. At this point Montgomery agreed to a voluntary layoff. Montgomery was not recalled by Respondent, and 60 days later, in accordance with Respondent's rules, she received a payroll termination notice setting forth she had been severed from work because she had been "on layoff in excess of 60 days." Respondent has not replaced Montgomery as a tool crib attendant. There is, however, no explanation in the record as to how her work is now being done.

It is undenied that in July of 1967 Montgomery had refused promotion to a job as Swiss automatic machine operator because she had expressed to Schum that she was unable to stand for any length of time. Schum made a note of this as the reason for her refusal to take the job at this time. It would appear from Miller's testimony that other sitdown jobs were available at or about this time, and that other nonunion employees were assigned to them. Respondent advances no explanation with regard to this. It may also be noted that when Ferguson, a nonunion employee, complained that she could not stand at the molding job she was transferred to assembly.

3. The alleged discriminatory discharge of Monica Felton

Employee Monica Felton first began work for Respondent on February 9, 1968. She was among the group of 96 employees who were laid off on March 15, 1968, under circumstances which will be described below. Early on the day of her layoff Felton had been called into her supervisor's office and advised by Supervisor Everett Clayton that he was satisfied with her work performance. Although Felton had signed a union authorization card before her layoff, there is no evidence that Respondent was aware of this.

On April 18, Felton was recalled to work, and on April 19 she went back to work as an assembler. Her immediate supervisor at this time was Don McClellan. On May 8, Felton attended a Board representation hearing involving employees at Respondent's plant. Personnel Manager John Wolcott was also in attendance. After reporting to her shift that same evening, Felton observed Wolcott talking to Supervisor McClel-

lan and looking in her direction. After Wolcott's departure, McClellan came over to Felton's work station and asked her "How [she] felt about the Union" and "the stand the company was taking against the Union." Felton told McClellan that the Union had the right to take the stand it was taking. On Friday, May 11, Felton attended a union meeting, and on Monday, May 13, Felton reported for work for the first time wearing a union committeeman's badge. On the first day she wore her badge, McClellan asked her if she had attended the union meeting. She replied in the affirmative and after some conversation about the Union, McClellan instructed Felton that she could not solicit for the Union. On May 17, McClellan, in the presence of personnel assistant Jack Jones, notified Felton that she was discharged. McClellan told Felton that she had not completed her probationary period and that he was "dissatisfied with [her] attitude." She asked McClellan what he meant about her attitude, but he refused to explain further. Respondent defends its position by asserting that it was dissatisfied with Felton's work performance, and inasmuch as the probationary period was based upon 90 days' actual work, it deemed it appropriate to take the action it did. Prior to the discharge, Felton had not received any warning or suggestion that her work performance was unsatisfactory.

4. The alleged discriminatory layoff of March 15, 1968

On March 15, 1968, Respondent laid off 96 employees. With the exception of four, whom the General Counsel alleges were selected for inclusion in the group for discriminatory reasons, it is conceded that in making the selections Respondent followed a seniority

policy, using a plantwide criterion for women employees, and a departmental criterion for male employees. The General Counsel's central contention is that this layoff was discriminatorily motivated. Respondent defends its actions by claiming that the layoff came about solely for economic reasons. To resolve the issue, we must first consider such matters as the timing and manner of the layoff, and then examine Respondent's alleged economic justification.

The layoff took place on a Friday. The preceding Monday Respondent had received written notification that the Union was launching an organizational drive. It was during the course of this week that Respondent had sent the letters noted above to all of its employees. During the same period, a substantial number of the alleged acts of the interference and discrimination, as related above, took place.

Other circumstances surrounding the layoff include the following:

(a) During the months of February and March, and continuing up to the date of the layoff, the Respondent had been advertising extensively in newspapers circulating in Oceanside and neighboring communities seeking to attract new employees to jobs in classifications similar to those held by the employees laid off on March 15.[9] Concurrently with the layoff, further advertisements for employees were temporarily curtailed. Prior to this, however, the local Oceanside management had not been informed that a layoff was even a remote possibility, nor had it been suggested

[9]These advertisements suggesting that applicants "prepare to stay" indicated that at Oceanside there were openings, among others, for "machine builders, precision grinders, tool and die makers, mold makers, Acme-Gridley and Swiss operators."

that a gradual easing in recruitment efforts through use of newspaper advertising might be advisable. Brooks, however, testified that it was not Respondent's policy to advertise unless it was really in need of help.

Between January 1, 1968, and the March 15 layoff, Respondent hired a total of 138 employees. Respondent hired 60 employees during the month of February. In the first 14 days of March, it hired 25 additional employees, including 12 who were hired in the first 4 days of the week that the layoff occurred. Employees were hired to fill jobs in a wide variety of classifications, including some highly skilled classifications such as die makers.

According to the undisputed testimony of employee Monica Felton, Personnel Supervisor Schum told her and two other persons also hired on February 9 that they "didn't have to worry about layoff because unlike the other companies he says the war and other matters does not affect the company and we wouldn't have the layoff. We would have steady jobs there." Employee Eufemia Sainz, who was hired on March 12, testified that on that day personnel assistant Jack Jones had told her that "this plant had come to Oceanside to stay and he says that never has a layoff been before, and I don't have to worry about layoffs and he told me this is a steady job." James Fetty, a machinist who quit Respondent's employ on March 13, testified without contradiction that Ray Schum had remarked on the day he quit that "right now we have openings for 40 more machinists, for trained men in the shop."

Prior to March 15, during the course of its three years' operation at Oceanside, Respondent had not had occasion to lay off any employees.

(b) A variety of evidence indicates that Respondent at the time of the layoff had more work scheduled than its work force could produce during the course of a normal 40-hour week. Male employees in Departments 451 and 461 had been working at least one day overtime since the first week in February. Overtime for such employees had been scheduled through March 15, the very day of the layoff, and the employees scheduled to work on that day who were not laid off put in an hour's overtime. After the layoff, such regular overtime ceased.

The undenied testimony of employee O'Leary indicates that when leaving work at the end of the day shift on March 14 he had been asked by Supervisor Rule if he "would like to work about 6 or 7 hours overtime." Employee Sainz testified that on March 15, the morning of the layoff, she and other employees in her department had been told that they were working on a rush order which had to be finished by that evening. Employee Kenny testified that on the day of the layoff there were so many orders in the front room that the employees were unable to fill them as fast as they were coming in.

The Oceanside plant is a relatively new one. It has been Respondent's aim from the outset to develop the Oceanside plant into a completely integrated operation which can produce all the component parts and tools needed to manufacture connectors. This objective had not been fully achieved by early 1968. Up to that time it has been the regular practice for Respondent to order from other manufacturers needed parts which for some reason or other it was unable to produce at Oceanside. The policy was to place these orders at other plants owned by Respondent whenever possible, but when this

could not be done to order from outside manufacturers. Such orders were not placed, however, if Respondent had the personnel and tools needed to do the job at Oceanside. In the early months of 1968, Respondent was not producing enough "shells" at Oceanside to meet its production needs. Accordingly, "shells" were being obtained from other sources. Some came from Respondent's Los Angeles plant. On March 6, 1968, Respondent placed an order for "shells" with Allesandro Automatic, Inc., a manufacturer outside the corporate family. General Manager Brooks testified that the Allesandro order, as well as the orders to Respondent's Los Angeles plant, was needed because Oceanside employees were unable to meet Respondent's requirements. Brooks states that at Oceanside Respondent "never had enough machines or the skilled people to set these machines up." The "shells," however, were a product Oceanside could produce in Department 451 within limits using employees operating so-called "Acme-Gridley" machines. An operator in this section, however, was among those laid off. Remaining Acme-Gridley operators had their hours reduced from nine to eight commencing on the first working weekday following the layoff. This need for "shells" continued to be sufficiently great following the layoff that Respondent found it necessary to increase substantially its orders to its Los Angeles plant for such products. The undenied testimony of employee Newbury indicates that between March 15 and May 1 Respondent placed nearly twice as many orders for "shells" with the Los Angeles plant than it had had occasion to place during the preceding 5½ months. Other employees testified that following the layoff they had experienced difficulties in meeting production schedules for so-called "her-

metic parts." They attributed such difficulties to the unavailability of sufficient personnel to work on such parts.

(c) On March 15, the 96 employees were told to stop work in the middle of their work shifts. They were informed that because of inventory adjustments and changes in manufacturing methods a layoff had become necessary. The following week each received a written payroll termination notice specifying the reason for his termination as "reduction in force." It was made clear, however, that this was a temporary layoff with all 96 employees subject to recall within 60 days if work needs would permit it.

Commencing on or about April 11, Respondent started to recall laid off employees. At the date of the hearing, all but 16 of those laid off on March 15 had either been recalled and put to work or had been offered employment and had declined it. No evidence was adduced to show if the recall at this time was made possible because of inventory changes and new orders, or because of attrition. The General Counsel concedes that except for the four specific cases to be considered below the layoffs and the recall were made on a seniority basis.[10]

Alex and Carl Deutsch, chairman of the Board and president of Respondent, respectively, made the decision to effectuate the layoff. Their decision was brought to

[10]The "Welcome" manual states that layoffs are to be made by seniority on a departmental basis. The March 15 layoff used departmental seniority for the men and plantwide seniority for the women. Wolcott explained that the women employees were unskilled and that because of this could be interchanged among the departments. The plantwide method was used for the women because it was possible to make transfers to adjust any inbalance that a plantwide seniority reduction in force would create.

the attention, and implemented by, the Oceanside management as follows: The Deutsches flew to the Oceanside plant from Respondent's Los Angeles headquarters in a company plane on the morning of March 11. They met with Plant Manager Brooks and advised him that they had "decided that we should lower our work forces by approximattly 100 people." Brooks testified that Carl Deutsch explained this directive by stating "that's how much expense we have to cut out to be within the budget set up for running the Oceanside plant." Pursuant to this direction, Brooks took immediate steps to determine which departments could absorb the reduction with minimum interference with overall operation. On the afternoon of March 11, after the Deutsches had departed, Brooks asked Plant Superintendent Flory "to find out how we could cut down about 100 people." Brooks did not at this time explain to Flory that his inquiry related to an immediate layoff. On March 12 or 13, Flory and Brooks went over a list of employees by individual departments considering such factors as work complement, inventory, and orders "to find out how long it would take, based on the orders we had, to produce the complete orders we had." According to Brooks, their joint efforts resulted in a decision as to the exact number in each department that could be laid off. The total came to 96. Up to this point, neither Brooks nor Flory had consulted with Dudley Kebow, production control manager, Fran Gallagher, quality control manager, John Wolcott, personnel manager, or any of the department supervisors. Wolcott was first notified on the afternoon of March 14 that there was to be a layoff. Wolcott in turn then notified the other supervisors of the impending layoff, and worked with them on its implementation. It was their task to trans-

late the number to be terminated into names in accordance with the controlling seniority policy. Seniority lists, as well as payroll records and paychecks, for the Oceanside employees are prepared by computers located at Respondent's Banning plant. After receiving notification of the layoff, Wolcott immediately telephoned Banning and directed the preparation of an up-to-date seniority list. This was flown to Oceanside by a special flight of a company plane on the afternoon of March 14. Wolcott immediately set to work with the departmental supervisors to make a selection of the persons to be terminated. The remainder of the afternoon of March 14 and part of that same evening were used by Wolcott and the supervisors to work out the mechanics of this process, including the computations of the wages due. On the morning of March 15, the data as to hours and wages was sent by company plane to Banning. The checks were prepared there and flown back to Oceanside. First notice of the layoff, together with the final checks was given to employees at midshift on March 15, at which point the 96 left the plant. It is Respondent's practice to issue payroll termination slips to all employees cut from its payroll. There was insufficient time to complete this task by midshift on March 15. Personnel department employees were required to work overtime on Saturday, March 16, to complete preparation of such lists. These were thereafter mailed to the laid off employees early the following week.

Brooks was Respondent's principal witness with respect to the layoff. Neither Alex nor Carl Deutsch, although they made the layoff decision, were called as witnesses. Brooks testified that beginning in the fall of 1967, the Deutsches had complained to him that the Oceanside plant was exceeding its budget, and had ex-

pressed the view that Oceanside was carrying too many persons on its payroll. Respondent submitted no budget figures to suggest the dimensions of the budget excess, or to show the relationship of any excess in early 1968, as compared to others in the past. Nor was it shown what, if any, consideration was given to means of meeting the budgetary problem, other than by a massive layoff. According to Brooks, when the budget issue was first brought up in late 1967, he convinced the Deutsches that immediate layoffs would adversely affect the Oceanside plant's ability to fill existing orders. Brooks represented, however, that increased efficiency would ultimately make possible a layoff with its consequent reduction in expenses. Brooks states that the Deutsches continued to press for a reduction in force. Brooks last heard from them on this subject approximately two weeks prior to their March 11 directive. At this time Brooks testified he advised the Deutsches that it was possible that the force might be cut "if we watch the incoming orders . . . than if those figures indicate the company was not in serious condition, we would be in a position to lower our work force." Brooks acknowledges that during the ensuing two-week period he had no further conversations with the Deutsches relating to any aspect of a cutback. Nor is it shown that Brooks submitted any information to the Deutsches during the interim relating to "incoming orders," which might signify that the conditions he had specified had been met. The only figures which Respondent produced at the hearing to support its asserted economic defense were dollar figures purporting to show orders due to customers, orders actually shipped, and orders shipped ahead of schedule during the months of December 1967 and January and Febru-

ary of 1968. Brooks testified that such figures showed that during these three months shipments to customers exceeded orders due to customers. It is claimed that this had the inevitable effect of reducing inventory. Brooks testified further that even with such reduction in inventory, "the necessity to replace that inventory, based on our history, wouldn't warrant our replacing as much inventory since we did not have future requirements to use it." Despite Respondent's reliance upon the state of the inventory and its relationship to existing orders as supplying economic justification for the layoff, Respondent did not undertake to produce records purporting to show exact figures as to inventory or orders. Brooks testified, however, that Respondent kept inventory records which would daily show items in stock as well as records as to existing orders.[11] As an added justification for the layoff, Brooks testified that "Certain departments were becoming more efficient." However, all the evidence in the record on this subject is of a most generalized nature. The testimony of Brooks signified that there had been continuing efforts by the Oceanside management to use improved methods and to get more skilled personnel. The testimony of Brooks, however, fails to specify precisely how these improvements considered in conjunction with the in-

[11]Brooks' testimony in detailing the steps he took to implement the March 11 directive of the Deutsches is particularly revealing. Brooks states that he and Production Manager Flory took departmental lists of employees. "We took each individual department, the tooling department, the machine department of which we have two, and contact manufacturing department, the assembly department, and compared—also the molding department, compared each individual department with the amount of inventory we had for the various things, orders we had on hand in each department, and we compared our production records to find out how long it would take, based on orders we had, to produce—complete orders we had."

ventory and orders had reached such a point by March 15 that they became a significant supportive reason justifying a layoff at this time.

D. *Discussion of the Issues and Conclusions*

The entire case centers upon the lawful or unlawful nature of Respondent's conduct upon learning that the Union was launching an organizational drive among its employees at the Oceanside plant. Formal confirmation that such a drive was first received by Respondent on the morning of March 11, 1968, in a letter from the Union. The foregoing recital shows Respondent's response to have been immediate and widespread. In many instances the conduct charged is not even denied. Some of this alleged unlawful conduct is directed against employees generally, and is said to be in violation of their Section 7 rights. Other acts are alleged as discriminatory with respect to specific individuals or toward groups of individuals.

1. The alleged acts of interference

Some twelve of Respondent's supervisors are charged with engaging in various unlawful acts including interrogation, threats of reprisals and promises of benefits, imposition of work restrictions, and particularly with widespread efforts to enforce an invalid no-solicitation rule. Six of these twelve supervisors were not called as witnesses. With respect to the others I have credited the versions of the General Counsel's witnesses where a conflict existed for reasons set forth above.

Respondent's formal opposition to the Union's drive was given forceful expression in letters to employees dated March 13 and March 15, 1968, respectively. Al-

though with two exceptions the General Counsel does not contend that Respondent's letters exceeded permissible bounds of free speech, the letters do express Respondent's opposition to the Union in the strongest possible terms, and need not be disregarded as a factor in evaluating the character and significance of other concurrent acts charged as unlawful. The letters are replete with characterizations of the Union as a dishonest enterprise willing to resort to any means including fraud, violence, and intimidation to gain bargaining rights. Attainment of such objective is represented as a disastrous consequence for the employees. Granted that Respondent may have honestly held such opinions, and had a right to express them, it presents them to the employees in a manner calculated to invoke an atmosphere of fear, confusion and apprehension which tends to make concurrent overt unlawful acts fall on more fertile ground.

In two particulars the General Counsel claims that Respondent in the letter of March 15 did exceed lawful limits. The General Counsel contends that the following statement should be construed as a warning to employees that participating in an economic strike would result in termination of their jobs:

> One thing that unions will tell you is that they will get you job security if you will pay them dues. *This is a lie!* Some of our employees have worked in union plants and have lost their jobs because of strikes. . . .

The construction urged by the General Counsel is indeed a permissible one. Were this the only reasonable construction I would agree that Respondent had exceeded lawful free speech limits. I view the statement

as equivocal, however, and as one that can as readily be construed to represent only that an economic strike may result in the replacement of strikers and the consequent loss of their jobs. So construed it would be permissible. Under the circumstances, contrary to the claim of the General Counsel, I do not find the foregoing statement in the March 15 letter to be an unlawful interference with employee rights.

Respondent's efforts to induce employees to repudiate the Union as expressed in the March 15 letter, and the accompanying stamped and addressed postcard, fall into a different category, however. As the General Counsel correctly points out it is a recognized form of unlawful interference for an employer to induce employees to sign statements repudiating the Union.[12]

While minimal assistance may be in order if employees have independently withdrawn their support, there is nothing in this record to signify that any employee had sought Respondent's assistance as to the proper procedure to repudiate his authorization card. On the contrary from what appears the circumstances parallel in every particular the format used by Respondent at its Banning plant during the organizational drive of another union. Such conduct at Banning had already been found by the Board to be unlawful when the drive opened at Oceanside.[13] In the Banning case the Board upheld the following finding of the Trial Examiner without comment:

> It is the opinion of the Trial Examiner that, while it is not unlawful for an employer to inform his

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[12]*N.L.R.B. v. Birmingham Publishing Company*, 262 F.2d 2, 7 (C.A. 5).

[13]*The Deutsch Company, Electronic Components Division, A Corporation, supra.*

> employees that the may withdraw their authorization cards if they had changed their minds, or if they were coerced or intimidated into signing, it is unlawful for an employer to attempt to assist them in revoking their cards by furnishing to them, without a demonstrated need or request therefor, addressed, stamped postcards which required no more than their signature to notify the Board of the revocation of their authorization cards. There is no showing that the employees required or requested such assistance of the Respondent. Therefore, it is concluded that Respondent, by distributing said cards to its employees, violated Section 8(a)(1) of the Act.

Respondent in the instant case, without any showing of additional justification, elected to follow the same course of action it had in the Banning case even to the point of identical language on the card. This suggests a disregard of its obligations under the law. I find the efforts of Respondent to induce employees to withdraw from the Union in the March 15 letter, including the use of the enclosed stamped postcard, to be an unlawful interference with employee rights, and that thereby Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

An employer may engage in interrogation of its employees with regard to their union sentiments and activities only in limited circumstances where it can be shown that such interrogation serves a useful purpose, and the interrogation is conducted with proper safeguards assuring employees that their response will not subject them to reprisals.[14] It has been found above

[14] *Blue Flash Express*, 109 NLRB 591.

that Supervisors Clayton, Mathews, Roemhild, Rule, Williams, Brent, McClellan, Pihl and Quick each interrogated various employees concerning their interest in, and support for, the Union. In no instance does Respondent advance a legitimate reason for such interrogation, and in no instance were employees given assurances against retaliation. On the contrary, as we shall see below, the interrogations were frequently threats of reprisal particularly in relation to enforcement of the no-solicitation rule. Under the circumstances, I find the various acts of interrogation recited above to constitute unlawful interference with employee rights, and that Respondent thereby engaged in conduct restraining and coercing employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

Although some general threats of reprisal were made, in most instances the threats and the imposition of work restrictions related to Respondent's no-solicitation rule and its enforcement as a means of limiting organizational activity.

The no-solicitation rule as it appears in the "Welcome" manual was initially promulgated in 1966 but it, admittedly, remained in effect at all times thereafter. Prior to the Union's organizational drive, its significance at the Oceanside plant appears to have been minor. Indeed the only evidence regarding it indicates that Respondent itself chose to ignore the rule with respect to solicitation for the United Crusade. Respondent, however, concedes that not only was the rule in effect at the outset of the organizational drive, but that it was invoked and enforced at this time. Respondent undertakes to justify both the existence and enforcement of the rule because it claims that circumstances

dictated a need for it. The rule on its face purports to prohibit solicitation of "membership in organizations during working hours on Company property." Although Respondent argues, with seemingly little conviction, that this signifies only a prohibition against organizational activity during working hours, the language of the rule itself belies such a construction. Moreover the record is replete with evidence, much of it undenied, that numerous supervisors told employees that the rule prohibited all solicitation on Company property. The Board, with court approval, has long adhered to the view that absent special circumstances an employer may not prohibit solicitation for a union during nonworking time and in nonworking areas.[15] Moreover the Board's view as to this very rule was well known to Respondent at the time it invoked it at Oceanside. In the proceeding involving Respondent's Banning plant the identical rule found in the same "Welcome" manual was attacked by the General Counsel. It was found to be unlawful by a Trial Examiner in a Decision issued on March 17, 1967; and the Trial Examiner's ruling was subsequently affirmed without comment by the Board in its Decision issued May 31, 1967.[16]

There remains for consideration Respondent's assertion that special circumstances existing at Oceanside, regardless of the situation at Banning, justify the broad rule there. Respondent argues that during the course of its organizational effort "union adherents coerced, deceived and intimidated employees into listening about

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[15] *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; *Gale Products*, 142 NLRB 1246; *Campbell Soup Company*, 159 NLRB 74.

[16] *The Deutsch Company, Electronic Components Division, A Corporation, supra.*

the Union, receiving union literature and joining the Union." It further claims that the Union made implied threats of violence to employees who indicated they did not wish to support the Union. It is this conduct that Respondent asserts makes the instant case an exception to the usual rule. Assuming that situations exist in which the disruptive character of a union's organizational efforts would justify the imposition of an unusually restrictive rule, Respondent has failed to establish in this record evidence of either substantial interference with work or undue intimidation of employees at any time during the organizational drive. At the hearing and in its brief Respondent made sweeping generalizations as to the gross misconduct of union agents both at and away from the plant. It failed, however, to adduce convincing supportive evidence. Respondent called seven employees and a substantial number of supervisors as witnesses. Their collective testimony discloses a union campaign neither disruptive of plant work, nor indicative of significant interference with those not interested in the Union. At the most, this evidence indicates differences of opinion existing among employees which in some instances were expressed in an abrasive manner. Moreover the rule was invoked and its enforcement threatened at the very outset of the union campaign, and before even minor disruptions had had a chance to develop. While there is no question that Respondent had every right to insist that employees work during worktime, the rule itself is phrased in terms of plant property regardless of working time and it stands undenied that the supervisors sought to enforce it against solicitation in the cafeteria during coffee or lunch breaks, and in the locker rooms before and after work hours. I find Respondent's claim that

the rule was needed as a "temporary expedient, needed to maintain peace among the employees" to be without support in the record. On the contrary from the record as a whole and Respondent's attitude toward the union as expressed by its letters and supervisors, I am convinced, and find, that the rule and its enforcement was aimed at inhibiting all lawful organizational efforts that employees might attempt on company premises. Accordingly, I find that Respondent from the outset of the campaign invoked an unlawfully broad no-solicitation rule, that it has not established the existence of special circumstances to justify such rule, and that thereby it has interfered with the rights of its employees and engaged in conduct violative of Section 8 (a)(1) of the Act.

As set forth above, we find its supervisors engaging in an extensive and widespread conduct not only to enforce the invalid rule, but also in various other ways undertaking to interfere with and intimidate employees from engaging in legitimate union activities. Not only did supervisors warn employees that penalties would result if they engaged in solicitation on company property, but in many cases they imposed, without explanation, more restrictive work conditions than had theretofore been in existence. Thus we note Supervisor Hall questioning employee Einertson as to his involvement with the Union, and telling him that this would ruin his chances for a good job. We find Supervisor Mathews warning employee Miller about the no-solicitation rule, and when she reminded him that management had engaged in solicitation for the United Fund, countering by saying that management could do as it pleased. Supervisor Reilly not only warned employee Silva about soliciting on company property, but restricted his work

activities after he put on the badge, and told him that the badge ruined his chances for advancement. Supervisor Roemhild warned employee Frankenburg about the no-solicitation rule and also imposed restrictions upon Frankenburg and other relating to the manner in which they carried on their work. Supervisor Rule warned employee Hodge concerning the no-solicitation rule, made derogatory comments concerning the Union and restricted Hodge and others, including employee Einertson, in the manner in which they carried on their work. Supervisor Brent warned both employees Hodge and Frankenburg concerning solicitation on company property. Supervisor McClellan warned employee Miller against solicitation, and engaged in surveillance during her lunch hour to see that his admonitions were observed. Supervisor Quick warned employee Mowery concerning soliciting on company property and threatened him with discipline if this should take place. Quick also warned employee Peeden against talking with Mowery.[17] Quick also threatened employee Ford with discharge if he should engage in solicitation, and commented that if he violated such instructions he would not get a promotion or might be terminated. Supervisor Pihl queried employee Jones concerning the Union, warned her that a union might result in loss of benefits, and solicited her to repudiate the Union. Pihl also queried employees O'Leary and Ford concerning the Union, and warned Ford that because of the Union he had hurt his chances for advancement. Pihl also

[17]The General Counsel claims that the wage increase accorded Peeden a few days after Quick had warned Peeden about talking with Mowery is also conduct violative of 8(a)(1). I disagree. Such increase unexpected and otherwise unexplained raises some suspicions that its motivation may have been unlawful, but I am not convinced that such suspicions are of sufficient import to support an inference that the purpose was unlawful.

threatened employee Einertson with discipline should he engage in solicitation on company property.

In substantial measure, these warnings, interrogations and work restrictions were directed at badge wearing union committeemen. It seems clear that the central thrust of Respondent's conduct was not aimed at work efficiency, but was directed at curtailing lawful organizational activity. Accordingly, I find that the totality of Respondent's approach as set forth in detail above stands out as a broad gauge infringement on employee rights, both designed and calculated to hinder and obstruct the organizational campaign which the Union had launched. I find that by such conduct Respondent has engaged in interference with employee rights thereby violating Section 8(a)(1) of the Act. Respondent's alleged discriminatory treatment of individuals and groups must be evaluated against this demonstrated broadly based unlawful interference with its employees in the exercise of their rights.

2. The discriminatory treatment allegedly directed at individuals

Mario Silva, Consuelo Miller, Frances Montgomery and Monica Felton are each alleged to have been subjected to discriminatory treatment by Respondent.

As set forth above, on March 26, Respondent issued a warning to employee Mario Silva for allegedly soliciting an employee in the cafeteria at lunch time. I've already found the no-solicitation rule to be invalid. It follows that attempts to enforce it by warnings or other means would also be unlawful and would interfere with the statutory rights of employees, and, if resulting in disciplinary action or reprisals, would constitute discrimination. Respondent's use of the no-solicitation rule

is well illustrated by the virtually undisputed facts relating to Silva. Respondent not only warned Silva for having violated the rule, but would not even give credence to his denial by affording him an opportunity to confront his accuser. Respondent followed this by denying Silva a wage increase which it appears otherwise would have been routinely granted. When Silva protested and filed a grievance, Plant Manager Flory ruled that the wage increase had been denied in part because of Silva's "disregard of rules." Clearly this had reference to the no-solicitation rule about which he had already been warned. Flory and General Manager Brooks then undertook to inject an issue of excessive absenteeism as justification for the denial, but this appears to be an afterthought. Theretofore Silva had never been warned about absenteeism, and previously he had received raises at regular intervals. The absenteeism issue thus appears as a pretext. While standing alone this might suffice to sustain a finding of unlawful motivation, we have in addition the undenied testimony of Silva that Supervisor Reilly expressly told him that the wage increase had been denied because he had joined the Union and gone against company rules. Moreover, we see Respondent following the denial of the wage increase with a still further reprisal by suspending Silva on May 1 for a further violation of the invalid no-solicitation rule. Not only this but Respondent was not even prepared to consider an apparently valid defense that Silva proffered to Supervisor Reilly. Under the circumstances, I find that Respondent unlawfully warned Silva regarding violation of an invalid no-solicitation rule, thereafter denied Silva a wage increase because of his disregard of such rule, and finally unlawfully suspended him for three days

because of a further alleged violation of such rule. I find each such act to constitute discrimination against Silva because of his activities, or Respondent's belief that he had engaged in activities, in support of the Union, and that by such acts Respondent has engaged in conduct violative of Section 8(a)(3) of the Act.

The discriminatory motivation behind Respondent's failure to transfer employee Consuelo Miller from a molding machine to a less onerous job is not so obvious, but I am of the opinion that it existed. Miller, like Silva, was a plant committeeman. She was interrogated, warned against solicitation on company property, and kept under surveillance to assure that the warning was heeded. It may be assumed that the transfer of the three silk screeners to the molding department was legitimate, but very shortly thereafter the other two nonunion employees received preferred treatment by way of transfers to less burdensome jobs. In addition, it is undisputed that other molding department employees were transferred to assembly-line and trimming jobs while Miller remained in the molding department. Miller was, of course, well qualified for either assembly or trimming jobs. Miller's protests went unheeded. Respondent's explanation that it wished to keep Miller as the senior screener available for such silk screening jobs as might arise is not convincing. Only once for a very short period did the need arise, and it has not been shown that the relative proximity of any other available job would have rendered Miller inaccessible should the demand have been greater. In view of Respondent's generally expressed opposition toward union organization and Miller's known union support, it is a fair inference that Respondent was influenced by this in according her less consideration

than it had granted others who had not demonstrated their union support. The validity of such a conclusion is convincingly reinforced by the undenied response of Personnel Manager Wolcott when Miller carried her protest to him. As noted above, Walcott told Miller that when she put on the badge she set herself apart from the others. Under the circumstances, I am satisfied, and find, that the Respondent's failure to transfer Miller from the molding department to a less onerous job came about because of her openly expressed support for the Union, and that thereby Respondent has engaged in conduct violative of Section 8(a)(3) of the Act.

The termination of Frances Montgomery on March 21, 1968, is also alleged as discriminatory. Since July of 1966, Montgomery had been the only female tool crib attendant. This was a sitdown job. Montgomery had earlier made it clear that she was not physically able to work at a standup job. She made it equally clear that she could not take the transfer to the molding department when it was offered on March 21 because of this physical incapacity. Montgomery was not a plant committeeman, but she had been interrogated earlier by both Supervisors Hall and Williams concerning her interest in the Union. She was an employee of long standing and known to be capable of performing other jobs which did not require standing, such as trimming and assembly work. Respondent represents that on March 21 there were no sitdown jobs of any nature available. This seems questionable in view of Miller's undenied testimony that only a few days later Respondent had transferred persons from the molding department to trimming and assembly jobs. It does not appear that as of the date of the hearing the Respond-

ent had resumed using female tool crib attendants. Respondent, however, does not undertake to explain why in March it abolished these jobs, or how it had thereafter carried on the work formerly done by female tool crib attendants. Under the circumstances, including Respondent's widespread expressed hostility to union organization, its failure to explain the elimination of tool crib jobs in the first place, and the unconvincing nature of its claim that no other jobs were available, I deem it reasonable to infer that Respondent's insistence that Montgomery accept molding machine work was motivated by its knowledge of her interest in the Union and that thereby Respondent sought to present a choice calculated to cause her to quit. Accordingly, I find that by such conduct Respondent engaged in discrimination against Frances Montgomery in violation of Section 8(a)(3) of the Act.

I am further convinced that the discharge of Monica Felton on May 17 was discriminatorily motivated. Felton, although a new employee, was laid off on March 15, and had been called back to work early in May. Prior to her layoff, Felton had been told that she was a satisfactory worker. It is Respondent's claim that following her return her work performance did not measure up to its standards, and that thus it elected to discharge her within the probationary period. Such claim will not withstand scrutiny.[18] According to Felton on the day of her discharge, Supervisor McClellan,

[18]The Respondent has a probationary period of 90 days for new employees. More than 90 days had elapsed since Felton's initial hire by the time of her discharge. However, while Felton had retained employment status during the period of her layoff, Respondent asserts that in computing the probationary period for any employee it counts only days of actual employment, and not days in which such employee is in layoff status.

had said to her that inasmuch as her probationary period was not yet up he was discharging her because he was dissatisfied with her "attitude." I credit Felton's testimony in this respect. Prior to this Felton had received no complaint or warning whatsoever from McClellan or any other supervisor signifying that she was not satisfactorily performing her work. Although Felton had not been a known union supporter at the time of the layoff, she had been observed by Respondent attending a Board representation hearing on May 8, and shortly after this had been interrogated by McClellan as to her feelings about the Union. On Saturday, May 11, she had attended a union meeting, and on the following Monday, May 13, had worn a union committeeman's badge to work. During this week McClellan queried her about her attendance at the union meeting. On May 17, he discharged her because of her "attitude." The timing of these events suggests strongly that the "attitude" which concerned McClellan is to be found in her newly shown interest in the Union, and I so find. Accordingly, I find that Respondent discharged Monica Felton on May 17, 1968, for unlawful reasons, thereby engaging in conduct violative of Section 8(a)(1) of the Act.

3. The alleged discriminatory layoff of March 15, 1968

The General Counsel, in effect, contends that the layoff of the 96 employees on March 15, 1968, was one facet of Respondent's response to the Union's organizational drive, and that the layoff was intended as a show of force designed to disrupt the Union's organizational drive at its outset. Various considerations tend to support such a claim.

I am convinced that the timing and execution of the layoff was undertaken in a manner unlikely to have occurred had Respondent been acting solely from economic considerations. I deem it impossible to isolate the layoff from other aspects of Respondents' widespread unlawful response to the Union's organizational drive, and I am not satisfied that its asserted economic justification will withstand scrutiny.

As we have seen, with news of the drive supervisors immediately commenced unlawful interrogations, and gave voice to threats of reprisals of one sort or another. The no-solicitation rule, theretofore observed in the breach, was promptly invoked. The importance of obeying this rule was brought home to many, particularly those identified as union plant committeemen. Restrictions in work conduct, not previously in effect, were imposed on employees, and it was represented that breaches of the no-solicitation rule would both result in discipline and jeopardize future advancement. Respondent's ostensible justification for invoking the no-solicitation rule has been found to have no substance.

Respondent's attitude toward organization is fully explicated in the letters to the employees of March 13 and 15. Even assuming the letters to be lawful within the limits of Section 8(c), we note them to be couched in terms likely to impress employees with the intensity of Respondent's opposition to organization. Moreover, the letter of March 15 goes even further, and has been found to encompass an unlawful effort by Respondent to induce employees to abandon the Union.

The letters, the acts of interference, and the acts of discrimination, heretofore found, whether occurring during the week of March 11 or thereafter, when con-

sidered in their totality, constitute a background which suggests an employer not only prepared to voice opposition to the organization of its employees, but also one prepared to exceed lawful limits if necessary to insure the success of its opposition. Such factors give support to an inference that the mass layoff may have been designed as a dramatic expression of this hostility to organization. Various factors lend substance to such a conclusion. Thus, we note the layoff to have been brought about without advance warning either to the employees or to lower echelon local management. The layoff came about at a time when some departments were steadily working overtime. For some two months prior thereto, Respondent's personnel department had been conducting an extensive advertising campaign to obtain new employees in all classifications. New employees coming to work had been told that no layoffs were in the offing. There had been a substantial number of new hires since the first part of the year, and hiring continued even into the final week of the layoff. The layoff decision was made on the very day Respondent learned that the Union's organizational drive was underway. Departmental supervisors not only were not consulted as to the viability of their respective departmental operations should a layoff ensue, but they did not even learn that it was to take place until the afternoon of the day preceding its occurrence. The same supervisors were then required to act with an urgency that demanded special flights to and from Banning to obtain lists and termination checks. Night work was required to complete the mechanics of the layoff so that it might be effectuated by midshift of the following day. Personnel department employees were required to work on the

Saturday following to mail out the termination slips which normally would have been handed to the employees with their termination checks. No explanation was offered to show the necessity for completing the entire layoff operation with such urgency.

The precipitant character of the layoff procedure, especially when it is considered against the background of Respondent's widespread, and in many aspects unlawful, opposition to organization as detailed in earlier sections, suggests in a compelling manner that a layoff at this time may have been meant as a massive show of force designed to nip in the bud the Union's organizational drive.

The foregoing inference, however, while permissible, would not necessarily have controlling significance should Respondent make an effective showing of economic circumstances indicating that sound business practice demanded a layoff at this time, and that its proximity to the Union's organizational drive, and its precipitant character, were purely coincidental. Respondent's showing, however, is not convincing.

While Respondent points out that commencing in the fall of 1967, corporate management had been pressing the Oceanside management for changes in operation aimed at bringing the Oceanside plant within its overextended budget, Respondent did not produce records as to the Oceanside budget which would either show the nature of this alleged budgetary discrepancy, or would indicate possible alternative approaches. Nor did it call the top corporate officials who were voicing these complaints. Initially, we see the Oceanside management able to forestall action ostensibly because it convinced these corporate officials that curtailment of

the work force would not permit the plant to fulfill its existing orders. It is contended that the situation changed in the early months of 1968 so that by March 15 a layoff was called for. The nature of this change, however, is not satisfactorily developed. Limited records produced indicate no more than that Respondent in these months was making progress in filling orders and thus was depleting its inventory: There is only generalized testimony from General Manager Brooks signifying his belief that in some way improved efficiency and the state of the inventory and orders made March 15 the right time for a massive layoff to meet a budgetary overextension the dimensions of which were never fully defined. Respondent's failure to produce the very records supposed to support its contentions makes evaluation of its conclusions impossible. No reason is advanced for not producing such records, and the inference is inescapable that possibly they do not provide the needed support.

We cannot overlook the significance of the conceded fact that the layoff decision was made by Alex and Carl Deutsch. Previously we find the Deutsches to have withheld action of this nature when convinced that the operation might suffer should it be undertaken. Two weeks before March 15 Brooks had done no more than represent to the Deutsches that if incoming orders were watched a cutback in personnel might become appropriate in the near future. The precise meaning of Brooks' representation to the Deutsches at this time is not altogether clear, but it scarcely suggests the likelihood that within two weeks a layoff of one-fifth of the personnel would be called for. On the contrary, Brooks seems to have been telling the Deutsches only that in the near future after a thoughtful evaluation of

orders and inventory a curtailment of the work force of an unknown dimension might be proper. Significantly, it does not appear that in the interim the impact of a cutback of any size was again discussed between Brooks and the Deutsches. Without further consultation, or apparent reference to orders or inventory, The Deutsches directed Brooks on March 11, 1968, to layoff 100 persons.

I seriously question that Brooks himself contemplated such a substantial immediate layoff and deem it likely that the directive came as a surprise to him. Unfortunately, we do not have the benefit of testimony from the Deutsches which might bear on the various considerations leading to their decision. It is not, however, claimed that they were unavailable. Absent their testimony supplemented by documentary evidence relating to budgets, orders and inventory, I find it difficult to believe that it was sheer coincidence that the layoff directive came concurrently with Respondent's first notification of the Union's organizational drive. Respondent has not produced sufficient evidence of compelling economic considerations to overcome a well-grounded inference that an underlying motivation for a mass layoff at this time may have centered in Respondent's opposition to the Union. On the contrary, I deem it to be the more reasonable inference that the layoff was an integral part of Respondent's openly expressed effort to thwart the success of the Union's organizational drive. The significance of a mass layoff coming early in an organizational campaign and taking place in a setting of unlawful acts of interference, discrimination and openly expressed opposition to the Union need not be underestimated. I am convinced, and find, that Respondent recognized this, and undertook this course.

of action as a likely means of forestalling the ultimate success of the Union's efforts to organize its employees. Accordingly, I find that by the layoff of 96 persons on March 15, 1968, Respondent was undertaking a dramatic show of its opposition to union organization, thereby discriminating against the laid-off employees with an object of discouraging membership in the Union. I find that by such conduct Respondent engaged in a violation of Section 8(a)(3) of the Act.

Inasmuch as I have found that Respondent has discriminatorily laid off 96 employees, there is no need to reach the General Counsel's alternative contention with respect to four employees included in this group. The General Counsel claims that Scott Mowery, Carlos Diz, Sebastiano Randone, and Edwin Ray were discriminatorily selected and thereafter discriminatorily refused reinstatement. I will recommend that Respondent offer reinstatement and make whole all persons laid off on March 15, which would include these four as well as the others. Accordingly, no useful purpose will be served at this point in considering their cases separately, although it may be noted that the issues were fully litigated during the course of the hearing.

As noted above the overtime that men employees in Departments 451 and 461 had been regularly getting was eliminated commencing March 18, the first workday following the layoff. These employees were engaged in the production of "shells," a product that Respondent could not produce at Oceanside in sufficient quantity to meet its needs. We have seen that it placed an order

for "shells" with an outside manufacturer on March 6, less than two weeks prior to the layoff. It was also ordering "shells" from its Los Angeles plant and these orders increased after the layoff. Admittedly it is Respondent's policy to produce all component parts possible at Oceanside, and only to order outside when a supplement is needed. Apparently it was fulfilling this policy in part by according the workers producing these "shells" an hour overtime on a more or less regular basis prior to the layoff. The March 6 order did not result in a change in this, but the layoff did, and at the same time it brought about an increase in orders from the Los Angeles plant. Respondent does not convincingly explain why continuing to follow its stated policy would not have resulted in continued overtime even after the layoff. It suggests no more than that the same economic reasons that prompted the layoff called for an additional cut in expenses thereby bringing about elimination of overtime. Having found the justification for the layoff to be without merit, and the layoff itself to have been discriminatorily motivated, it is a reasonable assumption that overtime elimination is part of the same pretext, and that it was undertaken as part of the same effort to make the whole cutback appear economically legitimate. Under the circumstances, I regard it as no more than another aspect of the show of force, and motivated for the same unlawful reasons as the layoff, and I so find. Accordingly, I find that by eliminating the overtime for men employees in Departments 451 and 461 Respondent was discriminating

against such employees as part of its efforts to discourage membership in the Union, and to defeat its organizational efforts. I further find such conduct to be violative of Section 8(a)(3) of the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent as set forth in section III, above, occurring in connection with the operations of Respondent discussed in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully terminated the employment of Frances Montgomery and Monica Felton,[19] I will recommend that Respondent be ordered to offer each immediate and full reinstatement to her former or substantially equivalent position. Having found that Respondent unlawfully denied Mario Silva a wage increase on April 1, 1968, thereafter unlawfully suspended him, I will recommend that Silva be reimbursed for all losses incurred as a result of a denial of the wage increase, and that he be made whole for

[19]Consuelo Miller was apparently restored to her former position so no affirmative order regarding her reinstatement is required.

loss of earnings during the period of his suspension. Having further found that Respondent discriminatorily eliminated overtime for the men employed in Departments 451 and 461 by reducing hours of work commencing on March 18, 1968, I will recommend that each person in such departments so affected be made whole for the losses incurred thereby after March 18 until such point, if any there be, that Respondent can establish that such regular overtime would have been eliminated on a nondiscriminatory basis. Having also found that Respondent discriminatorily laid off 96 employees on March 15, 1968, I shall further recommend that Respondent offer immediate and full reinstatement to each such employee to his former or substantially equivalent job unless it can be established that such reinstatement has already taken place or been offered and refused.[20] I shall further recommend that Respondent make whole those employees whose employment was unlawfully terminated, or who were discriminatorily laid off, denied overtime, transferred, or suspended, for losses, if any, that each may have incurred as a result of the unlawful discriminatory action, by payment to each of a sum of money equal to the wages each would have earned from the date of such discriminatory action to the date each is either reinstated or offered reinstatement, or in the event no reinstatement is involved covering the period that the discriminatory action continued, less the net earnings of each

[20]The record indicates that at the time of the hearing all but 13 of those persons laid off on March 15, 1968, had been either offered and accepted reinstatement, or had been offered and refused reinstatement. It is assumed, although the matter was not developed in the record, that each was offered employment to his former or a substantially equivalent position. Should this not be the fact with respect to any individual the scope of the recommended order would include any needed adjustment.

together with interest thereon at the rate of 6 percent per annum, and that loss of pay and interest be computed in accordance with the formula prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, to which the parties hereto are expressly referred.

The unfair labor practices committed by Respondent strike at the heart of the rights guaranteed to employees by Section 7 of the Act.[21] The inference is warranted that Respondent maintains an attitude of opposition to the purposes of the Act with respect to the protection of employees in general. It will accordingly be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.[22]

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following conclusions of law:

1. The Deutsch Company, Electronic Components Division, is an employer within the meaning of Section 2(2) of the Act, engaged in a business which affects commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the warning issued to Mario Silva on March 26, by the failure to grant Silva a wage increase on April 1, and by Silva's suspension on April 30, Re-

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[21] *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

[22] *May Department Stores v. N.L.R.B.*, 326 U.S. 376; *Bethlehem Steel Co. v. N.L.R.B.*, 120 F.2d 641 (C.A.D.C.).

spondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By its discriminatory failure to assign Consuelo Miller to a less arduous job shortly after her transfer on or about March 26, and by its discriminatory failure to transfer Frances Montgomery to a job that she was physically able to perform, thereby bringing about termination of her employment, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By its discriminatory discharge of Monica Felton on May 17, 1968, Respondent has engaged in unfair labor practices within the meaning of Section 8 (a)(3) of the Act.

6. By the discriminatory layoff of 96 employees on March 15, 1968, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By the elimination of overtime commencing on March 18, 1968, for men employed in Departments 451 and 461 Respondent has engaged in unfair practices within the meaning of Section 8(a)(3) of the Act.

8. By interfering with, restraining and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, as found above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce with the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, and conclusions of law, and upon the entire record in this proceeding I recommend that Respondent, The Deutsch Company, Electronic Components Division, its agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the Union, or any other labor organization of its employees, by unlawful interrogations, by invoking or enforcing an unlawful no-solicitation rule, by unlawfully promising benefits or threatening reprisals, or by discharging, laying off, or in any other manner discriminating against individuals with regard to their hire or tenure of employment, or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act.

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to Frances Montgomery and Monica Felton immediate and full reinstatement to their former

or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any losses each may have suffered as a result of her termination in the manner described above in the section entitled "The Remedy."

(b) Make whole the men in Departments 451 and 461 for losses incurred as a result of the elimination of overtime on March 18, by payment to each of sums of money equal to the amounts each would have received had such overtime not been discriminatorily eliminated.

(c) Make whole Consuelo Miller for losses incurred, if any, as a result of its failure to transfer her to less arduous work.

(d) Make Mario Silva whole for any losses he may have incurred as a result of the discriminatory failure to grant him the wage increase on April 1, 1968, and make him whole for the loss of wages resulting from his discriminatory suspension on April 30, 1968.

(e) Offer to each of the 96 employees laid off on March 15, 1968, who has not heretofore either been reinstated or offered and refused reinstatement, immediate and full reinstatement to his former or equivalent position without prejudice to his seniority or other rights and privileges and make each whole for any losses he may have suffered as a result of his layoff in the manner described above in the section entitled "The Remedy."

(f) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and other records necessary to analyze the backpay due.

(g) Notify any individual entitled to reinstatement if presently serving in the Armed Forces of the United States of his right to reinstatement upon application in accordance with the Selective Service Act and the Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(h) Post in conspicuous places at its usual place of business, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked "APPENDIX."[23] Copies of said notice on forms provided by the Regional Director for Region 21 of the National Labor Relations Board, shall, after being signed by Respondent, be posted by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 21, in writing, within 20 days from receipt of a copy of this Decision what steps Respondent has taken to comply therewith.[24]

Dated: April 3, 1969.

/s/ LOUIS S. PENFIELD
Louis S. Penfield
Trial Examiner

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[23]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[24]In the event that this Recommended Order be adopted by the Board, paragraph 2(i) shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply therewith."

APPENDIX

Notice to All Employees

Pursuant To
The Recommended Order of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act
(as Amended)

we hereby notify our employees that:

WE WILL NOT discourage membership in or activities on behalf of any of our employees in International Association of Machinists and Aerospace Workers (AFL-CIO) or any other labor organization, by unlawful interrogations, by making or enforcing an unlawful no-solicitation rule, by unlawfully promising benefits or threatening reprisals for engaging in union activities, or by discharging, laying off, or in any other manner discriminating against such employees with regard to their hire or tenure of employment except as authorized in Section 8(a)(3) of the Act.

WE WILL offer immediate and full reinstatement to Frances Montgomery and Monica Felton and to each employee laid off on March 15, 1968, who has not heretofore been reinstated or offered and refused reinstatement, to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL make whole each employee discriminated against, including those discriminatorily terminated, laid off, transferred, denied overtime, denied a wage increase, or suspended for any loss

of earnings each may have suffered as a result of the discrimination against him.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

All our employees are free to become or remain or refrain from becoming or remaining members of the above-named or any other labor organization.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION

.....

(Employer)

Dated.....

By.....

(Representative) (Title)

NOTE: We will notify any employee entitled to reinstatement if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California, 90014. Telephone Number: 688-5229.

No. 71-869

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
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Washington, D.C. 20570.

In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App 1-2) is reported at 445 F. 2d 901. The decision and order of the National Labor Relations Board (Pet. App. 3-80) are reported at 180 NLRB 8.

JURISDICTION

The decision of the court of appeals was entered on June 23, 1971, and Deutsch's petition for rehearing

was denied on October 8, 1971 (Pet. App. 1, 2). The petition for a writ of certiorari was filed on January 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the Company laid off 96 employees for the purpose of discouraging union membership, and that it solicited employees to revoke their union authorization cards.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 3-4.

STATEMENT

In March 1968, the International Association of Machinists and Aerospace Workers, AFL-CIO, began an organizing campaign at the Company's Electronic Components Division plant in Oceanside, California (Pet. App. 11-12). The Board found that the Company, in connection with this campaign and in violation of Section 8(a)(1) of the National Labor Relations Act, coercively interrogated employees about union activity; threatened reprisals to dissuade employees from union activity; unduly restricted union solicitation on Company property; and imposed stricter work rules to discourage union activity (Pet. App.

53-59). The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by warning, suspending, and withholding a raise from one employee, by transferring two employees to less desirable jobs, and by discharging another employee—all because of their union activities (Pet. App. 59-64). The court of appeals sustained these findings (Pet. App. 1), and petitioner does not contest them here.

The petition contests only the Board's additional findings that the Company violated Section 8(a)(1) of the Act by soliciting revocations of union authorization cards, and Section 8(a)(1) and (3) by laying off 96 employees for the purpose of discouraging union membership. The facts relating to these violations are as follows:

On March 13, 1968, the Company mailed to its employees a letter admonishing them not to sign a union authorization card (Tr. 28, GCX 4).[1] The letter further stated that it was "not necessarily true" that the authorization card would be "kept confidential by the union and the government" (*ibid.*). On March 15, the Company sent another letter to its employees, attacking the Union and concluding: "If you have changed your mind, been misinformed, coerced, threatened, or intimidated into signing an authorization card * * * you can revoke that card by mailing the enclosed post card" (Tr. 28-29, GCX 5). Enclosed in

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[1] "Tr." refers to the stenographic transcript of testimony, and "GCX" to the exhibits introduced by the General Counsel, at the Board hearing.

each letter was a stamped postcard addressed to the Board, reading as follows (*ibid.*):

> Re: Deutsch Electronic Components Division
>
> Gentlemen:
>
> Recently I signed a union representation card for the International Association of Machinists because of misinformation or duress.
>
> I hereby revoke my authorization for all purposes.
>
> ....
>
> Signature Date

On March 15, the Company notified 96 of its approximately 570 production employees that, effective immediately, they were being laid off and, unless recalled, would be terminated at the end of 60 days (Pet. App. 40, 41, 45; Tr. 128-129, 429-431, 512-514). Of the 96 employees, 45 had assembly-line jobs, 5 were inspectors, 11 were machine operators, 7 were in tooling or tool and die, 6 in component preparation, and the other 22 in miscellaneous supporting occupations (GCX 44). Supervisors were instructed to tell the employees that the reason for the layoff was "inventory adjustments, and because of a change in manufacturing methods" (Tr. 682). This was the language that the plant management had "work[ed] out among [them]selves * * * to be sure that all of [them] were saying exactly the same thing" to the employees (Tr. 774-775).

Until March 14, the day before the layoff, the Company had advertised extensively in local newspapers

for new employees in several of the job classifications affected by the layoff (Pet. App. 41; Tr. 921-922, GCX 32, GCX 33). Between January 1 and March 14, the Company hired 138 new employees, many of whom were in those job classifications. 12 employees, 11 of them in the affected job classifications, were hired between March 11 and March 14 (Pet. App. 42; GCX 48). Persons hired in this period were told by personnel representatives that they were getting a "steady job" and that they would not "have to worry about layoffs" (Pet. App. 42; Tr. 239-240, 583-584). When a machinist quit on March 13, a personnel supervisor told him that "right now we have openings for 40 more machinists, for trained men in the shop" (Pet. App. 12; Tr. 376-381).

From the week ending February 11, up to and including the layoff on March 15, employees in certain departments were regularly working overtime (Pet. App. 43; Tr. 102-103, 133-134, 165-166, 267-269, 360-361, 414-416, 511-512; GCX 11, 20, 27, 30, 34). One employee was asked to work six or seven hours overtime on March 14 (Pet. App. 43; Tr. 167-168). Employees in other departments were rushing to keep up with incoming orders, and were exhorted during the last two weeks before the layoff to "speed it up" because the Company was expecting more orders that might necessitate Saturday work (Pet. App. 43; Tr. 245-247, 480-482).

Beginning on April 11, the Company began to recall some of the laid-off employees, and, by May 3, had offered to recall 60 of them. Recall offers continued at a slower rate thereafter, until the end of

July, when all but 13 of the laid-off employees had either returned to work or had declined the recall offer. (Pet. App. 45, 73, n. 20; GCX 45, 46, 47.)

Based on the foregoing facts, the Board concluded that the Company had solicited the employees to revoke their authorization cards, and had thereby violated Section 8(a)(1) of the Act. The Board stated (Pet. App. 52-53):

> while it is not unlawful for an employer to inform his employees that they may withdraw their authorization cards if they had changed their minds, or if they were coerced or intimidated into signing, it is unlawful for an employer to attempt to assist them in revoking their cards by furnishing to them, without a demonstrated need or request therefor, addressed, stamped postcards which required no more than their signature to notify the Board of the revocation of their authorization cards. There is no showing that the employees required or requested such assistance of the Respondent * * *.[2]

The Board further concluded that (Pet. App. 70):

> by the layoff of 96 persons on March 15, 1968, Respondent was undertaking a dramatic show of its opposition to union organization, thereby discriminating against the laid-off employees with an object of discouraging membership in the Union * * * in * * * violation of Section 8(a)(3) of the Act.

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[2] Quoting from *The Deutsch Company, Electronic Components Division*, 165 NLRB 140, 145, involving similar conduct at the Company's Banning plant.

In reaching this conclusion, the Board rejected the Company's assertion that the layoff was motivated by economic considerations (Pet. App. 67-68):

> While Respondent points out that commencing in the fall of 1967, corporate management had been pressing the Oceanside management for changes in operation aimed at bringing the Oceanside plant within its overextended budget, Respondent did not produce records as to the Oceanside budget which would either show the nature of this alleged budgetary discrepancy, or would indicate possible alternative approaches. Nor did it call the top corporate officials who were voicing these complaints. * * * There is only generalized testimony from General Manager Brooks signifying his belief that in some way improved efficiency and the state of the inventory and orders made March 15 the right time for a massive layoff to meet a budgetary overextension the dimensions of which were never fully defined. Respondent's failure to produce the very records supposed to support its contentions makes evaluation of its conclusions impossible. No reason is advanced for not producing such records, and the inference is inescapable that possibly they do not provide the needed support.

The Board entered an appropriate remedial order (Pet. App. 4-5, 76-80). The court of appeals, in a *per curiam* opinion, held that the Board's findings were supported by substantial evidence, and enforced its order (Pet. App. 1).

ARGUMENT

1. The first issue raised in the petition (Pet. 2)—whether a layoff "carried out in order of seniority and for solely economic purposes" was unlawful—is not presented on this record. The Board found, and the court of appeals sustained its finding, that the layoff was not motivated by economic considerations, but rather was undertaken to discourage participation in union activities. Accordingly, the only issue actually presented is whether the Board's finding as to the petitioner's anti-union motive is supported by substantial evidence. Such a factual question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the evidence amply supports the Board's finding (*supra*, pp. 4-6; Pet. App. 40-50, 64-72).

2. Similarly, the second issue raised in the petition (Pet. 2)—whether the Company could "engage in any expression that might persuade employees to repudiate the union"—is not presented here. The Board specifically upheld petitioner's right to inform its employees of their right to revoke their authorizations (*supra*, p. 6). However, it found that by enclosing post cards, stamped and addressed to the Board, petitioner went beyond "expression" and actively solicited the employees to repudiate the Union. It is well settled that this type of employer action violates Section 8(a)(1) of the Act.[3]

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[3] See the cases cited in the Board's brief in opposition to the petition for certiorari in *The Deutsch Company, Metal Components Division* v. *National Labor Relations Board*, No. 71-854, which presents the identical issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
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National Labor Relations Board.

FEBRUARY 1972.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-869

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-869

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

Petitioner presents its petition for rehearing of this Honorable Court's order dated March 20, 1972, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Grounds for Rehearing.

On January 28, 1972, subsequent to the filing of Petition for Writ of Certiorari in this case, the National Labor Relations Board (hereinafter "the Board") in the case of *Gaf Corporation and International Union of Operating Engineers, AFL-CIO, Local 819*, 195 N.L.R.B. No. 11 (January 28, 1972), surrendered its longstanding policy that any employer expression which might lead to union disaffiliation was a *per se* violation of the Act by holding that in the absence of threat or promise informing employees of their right to with-

draw from a union and providing the means to do so is a protected activity. This decision was reached by a new three-man Board which had replaced the individuals who sat on the Board when the instant case was decided.

The addition of *Gissel* to the already confused question of what information or assistance an employer can extend to an employee in regard to union disaffiliation can only result in a chilling of employer communication. The very core of the Act is to preserve for employees the right to choose, with full knowledge of the facts, to join or not to join a union. Unless employers know to what extent they may participate in affecting these choices, their only safe option is to refrain from all communications. While *Gissel* suggests that the Board is finally willing to accept the free speech protection afforded by Section 8(c), the court below, which adopted the Board's pre-*Gissel* policy, is not willing to be bound by Congressional intent. Only this Court by granting Petition for Writ of Certiorari in this case can resolve the issue of the scope and extent of employer expression which lies at the very heart of labor-management relations in this country.

Historically, the Board has without exception taken the position that an employer may not engage in any expression, even if purely informational, which might in any manner negatively affect employee support for a union even if the expression is unaccompanied by any threat of reprisal or force or promise of benefit. Prior to the decision of the court below, the courts of appeal were equally adamant and consistent in holding that before any employer expression could be found actionable, including those which might lessen union support, the expression must contain a threat or promise —otherwise, the expression was protected and to be en-

encouraged by Section 8(c) of the Act. The court below broke with the traditional approach of the courts of appeal and ignored its own precedents by adopting the Board's position that any expression that might undermine employee support for a union is *a per se* violation of the Act regardless of the statutory protection afforded by Section 8(c) of the Act.

Now, subsequent to the filing of the Petition for Writ of Certiorari herein, the Board in *Gissel* has disavowed its prior policy and has conformed its position to that of the courts of appeal, except for the court below, by ruling that informing employees of their right to reject union affiliation and positively assisting employees in their right to disavow unionization is a protected right in the absence of threat or reprisal.

While this Court could simply remand this case to the court below to reconsider its decision in light of *Gissel*, the need for the Court to speak far outstrips the modest interests of the Petitioner. Providing employees with information as to their rights, including the right to disavow union affiliation, is a traditional and widespread practice which was originally upset by the decision of the court below and now has been reduced to havoc by the unpredictability generated by the recent reversal of the Board's position.

This Court has not since the enactment of Section 8(c) of the Act ruled upon the question of an employer's right or obligation to inform employees of their rights under the Act and, more importantly, this Court has never clearly enunciated the scope of Section 8(c) of the Act or the rights thereunder. The need for guidance from this Court has since the passage of Section 8(c) in 1947 become critical as labor-management relations has become the principal forum for economic debate.

DISCUSSION.

A. The Status of the Law Prior to the Decision of the Court Below and the Recent Change in Board Policy.

Prior to 1941, the Board required an employer to remain strictly neutral in labor-management relations and prohibited the employer from expressing its views as to the relative advantages and disadvantages of union affiliation or disaffiliation. By proscribing employer communications, the Board denied to employees the right to receive and utilize information and opinions supplied by one of the parties most interested in an organizational drive. Commencing in 1941 with the case of *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), this Court admonished that an employer's communication could not be the basis for an unfair labor practice if the communication was unaccompanied by threat or promise.

The legislative history of Section 8(c) conclusively evidence that Congress felt that the Board was far too restrictive of the employer's right of free speech in the expression of his views on labor matters (See Petition, pp. 28-29). By adding Section 8(c), Congress unequivocally declared that an employer's expression could no longer constitute an unfair labor practice unless the expression contained a threat or promise.

However, the Board traditionally has ignored the admonition of this Court and the congressional intent embodied in Section 8(c) and chosen to find that any expression raising any likelihood of union disaffiliation constitutes a *per se* violation of the Act regardless of the absence of threat or promise.

All the courts of appeal, prior to the decision of the court below, which have considered the question

of the right of an employer to advise its employees of the right to withdraw from union affiliation and provide means to do so have held the employer's actions to be permissible in the absence of coercion.

In Federation of *Union Representatives v. NLRB*, 339 F. 2d 126 (C.A.2, 1964), the court found that the employer's solicitation of resignations from the union by means of a face-to-face conversation without threat of reprisal or promise of benefit was permissible.

In *NLRB v. Brookside Industries, Inc.*, 308 F.2d 224 (C.A.4, 1962), the employer's personnel director advised some employees of how to revoke their authorization cards. The court ruled that because there had been no unlawful threats or promises such activity was protected.

On three prior occasions, the court below has considered the issue before this Court. In each case it has denied enforcement of the Board's order.

In *NLRB v. Sun Co. San Bernardino*, 215 F.2d 379 (C.A.9, 1954), the employer advised his employees that they could cancel authorization cards by writing to the union. The court found that because the conduct contained no threat of reprisal or force or promise of benefit, there was no unfair labor practice and the conduct was protected by Section 8(c) of the Act.

In *NLRB v. The Deutsch Company*, 408 F.2d 684 (C.A.9, 1969), the issue before the court was, as in this case, the lawfulness of informing employees by letter of their right to withdraw authorization cards. The court held that the proscriptions of the Act were not intended to encompass trivial behavior when first amendment rights were jeopardized.

In *S. H. Kress & Co. v. NLRB*, 317 F.2d 225 (C.A. 9, 1963), employees reported to their employer that they did not believe that 30% of the employees had signed cards. Thereafter, the employer interviewed *individually* substantially all of the unit petitioned for by the union. The interviews were conducted in a closed storeroom area. Each employee was handed a mimeographed form which stated in the alternative that he had not signed for the union or that he had signed an authorization card and wanted it revoked, and was asked to sign one or the other in front of management representatives. The order of the Board was set aside on the grounds that the employer's acts were non-coercive and should even be encouraged as an aid to employees in exercising their Section 7 rights.

B. In Conformance With Its Prior Policy the Board Found the Subject Communication to Be a Violation of the Act While Conceding That the Letters Did Not Contain Any Threat of Reprisal, Force or Benefit.

The Board in the instant case conceded that the communication contained no threat or promise; nonetheless, the court below adopted the Board's position that the letters constituted a *per se* violation of the Act.

The petitioner sent its employees a letter which indicated that if they had been misinformed, coerced or intimidated into signing an authorization card or the authorization card was a forgery, they could revoke it by a particular method. The letters were not coercive and the Board makes no such contention.

The petitioner was scrupulously careful in avoiding any threat or promise. In fact, rather than merely avoiding making any threat or promise, which is all

that Section 8(c) requires in order to preserve free speech protection (see *Federation of Union Representatives v. NLRB, supra; NLRB v. Brookside Industries, Inc., supra; NLRB v. Sun Co. San Bernardino, supra*), the petitioner made absolutely certain that no employee would feel intimidated or threatened in deciding whether to withdraw his card. The enclosed postcard was addressed to the Board's Regional Office and simply stated the sender's desire to revoke his authorization card. The postcard was not returnable to the petitioner. The employees were not required to indicate to the petitioner whether the postcards were sent, and the employees were not asked what they had chosen to do with the postcards. With this knowledge, the employees could exercise their rights freely and without fear because they knew that the petitioner had no way of knowing what action, if any, the employee had taken with respect to the cards; therefore, there was no possibility of coercion or interference with the right of the employees to exercise their freedom of choice.

C. The Court Below Was the First Court to Hold as a Matter of Law That a Communication Which May Result in Union Disaffiliation Is Unlawful Regardless of Threat or Promise.

The court below held the sending of the letters to be a *per se* violation of the Act and sought to justify its holding by adopting the Board's rationale that "*an employer cannot engage in conduct calculated to erode employee support for the union.*"

It is respectfully submitted that this is no rationale at all. It is undisputed that it is not the undermining of employees' support of the union that is contrary to the law but the manner, method and approach used

in doing so which makes a particular act violative; *i.e.*, an expression containing a threat of reprisal or force or promise of benefit. It is undisputed that such activities as accusing the union of trying to take away promised wage increases (*NLRB v. Gotham Industries*, 406 F.2d 1306 (C.A.1, 1969)); warning employees of union trickery and that unionization means strikes and loss of jobs (*NLRB v. Hawthorne Co.*, 404 F.2d 1205 (C.A.8, 1969)); informing employees that the union had deprived the store of heat and had secreted purported authorization cards from impartial persons as a check of majority status (*NLRB v. L. L. Brandeis & Sons*, 145 F.2d 556 (C.A.8, 1944)); telling employees that signatures on authorization cards would not be kept secret (*NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967)), and all other communications attacking unionization are lawful if unaccompanied by threat or promise.

D. The Presently Constituted Board Has Altered Its Position to Conform With the Directive of Section 8(c) by Finding That Informing Employees of Their Right to Disavow Union Support and Affirmatively Providing the Means to Do so Is Not a Violation of the Act in the Absence of Threat or Promise.

Since the decision of the Board in this case there has been a complete change in the personnel of the Board. The presently constituted Board in *Gaf* rejected the Trial Examiner's decision and conclusively held, in a factual situation less neutral than the instant case, that in the absence of threat or promise an employer may advise employees of their right to withdraw from a union and provide the means to do so. A true and

correct copy of the pertinent part of the *Gaf* decision as reported in 1972 CCH, NLRB paragraph No. 23,853, is attached hereto as an appendix.

In *Gaf*, an employer suggested that employees form a separate grievance committee as a means of bargaining collectively rather than continuing to give majority support to a union. Further, the employer informed the employees of their right to file a decertification petition, typed up the decertification petition for the employees, and allowed the employees to circulate the decertification petition in the plant in violation of a company rule. The Board in reversing the Trial Examiner's decision found the activities to be lawful because as found by the Trial Examiner, these activities were not accompanied by any promises or threats. Certainly the facts in the instant case conclusively evidence the employer's greater neutrality in preserving for the employees an atmosphere clinically free of coercion in deciding to remain or withdraw from the union (see Petition, pp. 4-9).

As the record now stands there is no possible way an employer can, with any degree of assurance, determine what information he may legally transmit to his employees with regard to their rights to withdraw from a union. The disorientation created by the flip-flopping of the position of the Board and the courts can only lead to overcautiousness by employers with a concomitant diminution in the employees' right to receive and utilize information in deciding whether or not to remain union members. The result will be to discourage communications which admittedly are intended to undermine union support, previously held to be lawful absent coercion. These include predictions of loss of work, harder work, and plant closure with unionization

(*NLRB v. Golub Corp.*, 388 F.2d 921 (C.A.2, 1967)); conclusions that employees would lose rather than benefit from union representation (*NLRB v. Modern Plating Co.*, 358 F.2d 46 (C.A.7, 1966)); opinions that with unionization would come loss of customers and increasing costs (*P. R. Mallory & Co. v. NLRB*, 389 F.2d 704 (C.A.7, 1967)); indicating that the employer would deal hard with the union if the union was successful (*NLRB v. Wilson Lumber Co.*, 355 F.2d 426 (C.A.8, 1966)); and impressing upon employees that unionization would disrupt employer-employee relationships and subject employee job security to the whims of union leaders (*NLRB v. TRW-Semiconductors*, 385 F.2d 753 (C.A.9, 1967)).

Only this Court can render desperately needed guidance.

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

LEON M. COOPER,
Counsel for Petitioner.

Certificate of Counsel.

I, LEON M. COOPER, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

LEON M. COOPER,
Counsel for Petitioner.

APPENDIX.

[¶23,853] GAF CORPORATION and INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL 819.

195 NLRB No. 11, Case Nos. 16-CA-4280 and 16-CA-4328, Robert E. Mullin, Trial Examiner.

¶23,853

January 28, 1972

Before MILLER, KENNEDY and FANNING.

Arthur J. Riggs, Louis P. Bickel and Robert H. Bliss, Dallas, Tex. and Paul Weiner, New York, N.Y. for Employer, LeRoy Neally, Fort Worth, Tex., Business Representative for Union, Phillip R. Jones and Robert A. Gritta for NLRB.

Interference—Fact Finding—Suggesting Formation of Employee Committee

On the facts, an employer unlawfully interfered with employees' rights by suggesting that employees who were represented by a union form their own grievance committee. Section 8(a)(1).

Interference—Encouragement of Decertification Petition—Advice as to Legal Rights

An employer did not unlawfully interfere with employees' rights through conversations between a production supervisor and employees over possible circulation of a decertification petition, since *the employees were merely advised, in response to their questions, of their rights* as to the petition and the necessity for preliminary employee support. Section 8(a)(1).—Back reference ¶3830.835.

Doubt of Union Majority—Good Faith—Decertification Petition—Signing by Majority

An employer did not fail to meet its bargaining duty by withdrawing recognition of and refusing to bargain with a union, since the doubt of the union's majority status was based on the knowledge that a majority of its employees had signed a decertification petition and had not been coerced into doing so. Section 8(a)(5). — Back reference ¶ 3046.064

Interference—Fact Finding—Threats and Promises

On the facts, there was *insufficient evidence to show that an employer had unlawfully interfered with employees' rights by promising benefits* for withdrawing from a union *or by threatening reprisals against employees* who helped in a Board investigation. Section 8(a)(1).

Trial Examiner's Findings and Conclusions

An employer, engaged in the manufacture of photographic films and paper, is charged with having violated Section 8(a)(1) and (5) of the Act by suggesting that employees form their own union and circulate a decertification petition, and by withdrawing recognition from the union certified as the exclusive bargaining representative of its employees.

Evidence showed that the employer, through its production supervisor Trebilcock, urged an employee to circulate a petition for a decertification election among employees. He also suggested that the employees form their own grievance committee. Such activity is interference with employees' rights and is violative of Section 8(a)(5) of the Act, since it interferes with the free choice of bargaining representative.

Board's Decision

The Board affirms the Trial Examiner's decision only to the extent consistent with the following findings.

It is found that the employer did not violate Section 8(a)(1) of the Act by suggesting the circulation of a decertification petition. The conversations about the petition that took place between Trebilcock and one of the employees who circulated the petition concerned the employee's questions about how the petition should be drawn up. They were initiated by the employee. Trebilcock *did no more than inform the employee of his legal right to file a decertification petition and* of the preliminary requirement of employee support.

The statements concerning the petition were not connected with the employer's unlawful suggestion made a month previously, but never implemented, that employees form a separate grievance committee.

The Trial Examiner's finding that the employer unlawfully ceased to recognize and bargain with the union is overruled. While the filing of a decertification petition does not provide sufficient grounds for a good faith doubt of an incumbent union's representative status, as such a petition need only be supported by 30 percent of the employees, the petition signed by an uncoerced majority of employees does provide such grounds.

In the instant case, the employer knew the petition had been signed by a majority of the employees. Moreover, it has been found that the employees were not unlawfully induced to sign the petition.

The one remaining violation, the suggestion that the employees form their own grievance committee, did not affect the union's majority status or cause employee

disaffection. It therefore stands as an independent violation and does not affect the Board's finding of no unlawful refusal to bargain.

Even though the petition was typed with a company typewriter and was circulated without difficulty in apparent violation of a rule against employees being at the plant when off duty, it was not tainted. The rule was rarely enforced, and there was no rule against solicitation.

Accordingly, the petition was free of unlawful employer interference. Therefore, the employer had objective grounds for doubting the union's continuing majority status. No violation of Section 8(a)(5) is found.

Dissenting Opinion

Member Fanning would find that the suggestion of forming an employees' committee and the decertification petition were closely related. Thus, in his opinion, the petition was tainted and could not be relied upon by the employer as a basis for a good-faith doubt of the union's majority status. Accordingly, the Trial